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THE C
IRISH LAND REPORTS.

EDITED BY
HENRY MACAULAY FITZGIBBON, M.A.,
BARRISTER-AT-LAW.

VOLUME XIII.—1908.

0 This publication contains full and revised Reports of all the important Current Cases bearing on the relation of Landlord and Tenant, decided either by the Superior Courts, the Chief Land Commission, the County Courts, or the Sub-Commission Courts.

DUBLIN:
JOHN FALCONER, 53 UPPER SACKVILLE STREET.
OFFICE OF THE "IRISH LAW TIMES AND SOLICITORS' JOURNAL."

1908

JUN 7 1909

DIGEST OF REPORTS OF CASES.

	PAGE
IN THE MATTER OF THE ESTATE OF PAUL CHRISTMAS ANDERSON , continued in the names of T. W. ANDERSON and A. C. ANDERSON, the Trustees and Executors of his Will.—Land purchase—Originating application—Request to purchase demesne included in—Death of vendor—Power of Land Commission to purchase and resell the demesne to trustees and executors of vendor. (L. C.)	248
IN THE MATTER OF THE ESTATE OF THE RIGHT HON. JAMES FRANCIS EARL OF BANDON .—Land Purchase Acts—Distribution of purchase-money—Arrears of rent payable to vendor—How calculated—Irish Land Act, 1903, s. 24 (8). (L. C.)	55
BELL v. ARCHBOLD .—Lease—Deposit applicable to discharge of rent of last year of term—Payment of interest on deposit—Effect of fair rent being fixed—Covenants running with the land. (K. B.)	210
BERRYMAN AND OTHERS v. M'CRUM .—Landlord and tenant—Rent—Guarantee given to a lessor, "his heirs, executors, administrators and assigns,"—Assignment of reversion—Right of assignee to sue on guarantee. (Cir. Cas.)	240
IN THE MATTER OF THE ESTATE OF J. A. H. MOORE BRABAZON .—Practice—Irish Land Act, 1903, s. 15—Vesting order—Amendment—Intervening interest—Claim for compensation out of purchase-money—Estoppel. (L. C.)	182

ESTATE OF ROBERT P. D. SPENCER CHESTER.—Land purchase—Title—Person having power to sell—Forfeiture on bankruptcy— <i>Spes successionis</i> . (App.)	PAGE 65
IN THE MATTER OF THE ESTATE OF THE MARQUIS OF CLANRICARDE (No. 1).—Evicted Tenants (Ir.) Act, 1907—Questions of law arising under—Submission to Judicial Commissioner under s. 23 of the Irish Land Act, 1903—Application to transfer to High Court under s. 71—Right of appeal. (L. C.)	193
IN THE MATTER OF THE ESTATE OF THE MARQUIS OF CLANRICARDE (No. 2).—Evicted Tenants (Ir.) Act, 1907—Land in occupation of new tenants—Compulsory acquisition by Estates Commissioners—Consent of new tenant. (App.)	200
IN THE MATTER OF THE ESTATE OF THE HON. R. S. G. STAPLETON COTTON.—Land Purchase Acts—Practice—Life annuity—Retainer of sufficient money to meet—Objection by annuitant—Irish Land Act, 1903, s. 24 (4). (L. C.)	221
EVELYN VISCOUNTESS DE VESCI <i>v.</i> O'CONNELL.—Land Purchase Acts—Appeal to House of Lords from decision of Land Judge—Competency—Superior interest—Head rent—Apportionment—Redemption of liability for rent out of estate indemnified therefrom—Right over against indemnifying lands—44 & 45 Vict., c. 49, s. 48 (2)—Land Law (Ir.) Act, 1896 (59 & 60 Vict., c. 47), ss. 31 (4), 33 (4)—3 Edw. VII., c. 37, s. 24 (13). (H. L.)	129

	PAGE
IN THE MATTER OF THE ESTATE OF WILLIAM TOKE DOONER.—Land Purchase Acts—Practice—Redemption of superior interests—Costs of parties entitled—Sum retained insufficient. (L. C.)	165
FORTE v. WRIGHT.—Town Tenants (Ir.) Act, 1906—Tenancy for “a year certain” to be determined by either party serving one month’s notice—Rent payable monthly. (App.)	207
IN THE MATTER OF THE ESTATE OF THOMAS FROST.—Land Purchase Acts—Repurchase of demesne by tenant-for-life — Application by remainderman that land resold should devolve in accordance with trusts of settlement—Irish Land Act, 1903, s. 3 (4). (L. C.)	230
IN THE MATTER OF THE ESTATE OF EDITH MILLICENT PAYNE GALLWEY.—Land purchase — Practice — Superior rent — Redemption—Receiver’s fees. (L. C.)	114
IN THE MATTER OF THE ESTATE OF EMELIA JULIA AYLMER GOWING.—Land Purchase—Enforceability of agreements after death of vendor—Discretion of Estates Commissioners as to sanctioning advances. (L. C.)	117
GUILFOYLE’S ESTATE.—Land Purchase—Act, 1896, s. 40—Tenant refusing to purchase—Sale of portion of estate—Meaning of “estate”—Loss of right to compel sale. (Ross, J.)	41
IN THE MATTER OF THE ESTATE OF WILLIAM T. J. GUN.—Land Purchase Acts—Sale of an estate to the Land Commission—Estimated price—	

	PAGE
Basis of estimate—Agreements for sale between landlord and judicial tenants—Prices within the zones—3 Edw. VII., c. 37, ss. 1 and 6. (App.)	1
IN THE MATTER OF THE ESTATE OF GEORGE HEWSON AND JAMES E. PENROSE. —Land purchase—Declaration of estate—Exclusion of portion of lands included in originating application—Irish Land Act, 1903. (L. C.)	110
IN THE MATTER OF THE ESTATE OF CAPTAIN RICHARD WILLIAM BLACKWOOD KER. —Land purchase—Sale direct to tenants—Landlord—Meaning of in Land Purchase Code—Tenant-for-life—Assignor of life estate—Competent vendor—Bonus—Settled Land Act, 1882, s. 50—Land Law (Ir.) Act, 1881, s. 57—Land Law (Ir.) Act, 1887, ss. 14, 34—Irish Land Act, 1903. (L. C.)	123
M'KONE v. OLARKE. —Landlord and tenant—Agreement for lease—Construction—Letting “free of all rates, taxes, or other charges”—Town rates—Rates charged on land. (Cir. Cas.)	235
IN THE MATTER OF THE ESTATE OF M. J. MALONE. —Land Purchase Acts—Limitation on advances—Purchase of Land Amendment Act, 1888, s. 2—Irish Land Act, 1903, s. 1 (1, 4). (L. C.)	168
IN THE MATTER OF THE ESTATE OF MARKHAM R. L. MARSHALL. —Land purchase—Practice—Superior interest—Redemption—Renewable lease—Renewal fines—Penalty for non-renewal—Tenantry Act. (L. C.)	47
NASH & SON v. NEAZOR. —Land purchase—Purchase agreement—Arrears of rent—Promissory note given in respect of arrears. (K. B.)	99

	PAGE
NUGENT <i>v.</i> WILSON.—Land Purchase Acts—Landlord and tenant—Agreement to purchase holding—Payment of rent by tenant after date of agreement—Agreement signed and antedated by landlord after payment—Action for money had and received. (Cir. Cas.) : - - - - -	243
IN THE MATTER OF THE ESTATE OF MARIA L. EYRE POWELL.—Land Purchase Acts—Practice—Vendor tenant-for-life—Death of, prior to completion—Bonus—To whom payable—Irish Land Act, 1903, s. 48—Irish Land Act, 1904. (L. C.) - - - - -	43
IN THE MATTER OF THE ESTATE OF THOMAS FAIR RUTTLEDGE.—Land purchase—Limitations on advances—Tenancy created since Jan. 1, 1901—Court letting—Former tenant—Irish Land Act, 1903, s. 53 (1). (L. C.) - - - - -	52
IN THE MATTER OF THE ESTATE OF HELENA RYAN.—Land Purchase Acts—Practice—Lease for lives renewable for ever—Unpaid renewal fines—Redemption price of rent—Priority of. (L. C.) - - - - -	224
EXECUTORS OF SMYTH (Claimants) ; NICHOLSON (Respondent).—Compensation for disturbance—Order of Land Commission fixing—Interest—Land Act, 1870—Land Law Act, 1881—3 & 4 Vict., c. 105, ss. 26, 27. (L. C.) - - - - -	174
STAPLES <i>v.</i> YOUNG.—Land purchase—Reservation of the benefit of mines and minerals—Sand—Ordinary agricultural holding—Sand not a mineral. (App.) - - - - -	26
IN THE MATTER OF THE ESTATE OF SIR WILLIAM STAWELL.—Land purchase—Irish Land Act, 1903, ss. 12, 43—Reserve fund—Power	

to make advances out of—Holding sold under prior Land Purchase Acts. (L. C.)	PAGE - - 107
WARNOCK <i>v.</i> JOHNSTON.—Originating notice to fix fair rent—Transfer of proceedings—Undertaking not to institute proceedings against tenant pending hearing of application—Ejectment for non-payment of rent—Decree—Estoppel. (Barton, J.) 89, (App.)	151
IN THE MATTER OF THE ESTATE OF MARIA J. WEIR.—Land Purchase Acts—Irish Land Act, 1903—Proceedings for sale under—Provisional declaration—Estate—Procedure of Estates Commissioners—Jurisdiction. (App.)	12
WILKINS <i>v.</i> M'GINITY.—Landlord and tenant—Lease for a term—Power of surrender at end of two years—Three months' notice—Tenancy commencing on Nov. 1—Notice to surrender on Nov. 1 received by landlord on Aug. 1—Interpretation—Calendar months or lunar months. (App.)	34
IN THE MATTER OF THE ESTATE OF HUGH GILMER WILSON. — Land purchase — Vesting order—Effect of—Lands included which vendor had not a title to sell under the Acts—Variation of order—Irish Land Act, 1903, ss. 16, 17—Land Law (Ir.) Act, 1896, s. 32 (3)—Local Registration of Title (Ir.) Act, 1891, s. 34. (App.)	75
IN THE MATTER OF THE ESTATE OF WILLIAM WINTER AND ANOTHER AND IRISH LAND COMMISSION <i>v.</i> FARRELLY. — Tithe rent-charge—Statute of Limitations—Discontinuance of receipt—Payment by person not liable—Real Property Limitation Acts, 1833, 1874—3 & 4 Will. IV., c. 27, s. 3; 37 & 38 Vict., c. 57, s. 1 (App.)	156, 160 n.

INDEX TO LAW CASES.

	PAGE
Advances, limitation on - - -	168
Agent, representation by ; estoppel - - -	89
Agents, position of - - - -	99
Agreement for lease ; construction : town rates -	235
Agreement for purchase - - - -	99
Agreement to purchase, payment of rent after -	243
Agreements, enforceability of ; death of vendor -	117
Agreements for sale between landlord and judicial tenants - - - -	1
Amendment of vesting order - - - -	182
Appeal to House of Lords - - - -	129
Appeal under Evicted Tenants (Ir.) Act, 1907 -	193
Apportionment of head-rent - - - -	129
Arrears of rent payable to vendor, how calculated -	55
Arrears of rent, promissory note for - - -	99
Bankruptcy, forfeiture on, of right to inherit -	65
Basis of estimated price on sale - - - -	1
Bonus : death of vendor - - - -	43
Bonus, tenant-for-life, assignor - - - -	123
Compensation for disturbance - - - -	174
Compulsory acquisition of land by Estates Commis- sioners - - - -	200
Costs, sum retained insufficient - - - -	165
Court letting - - - -	52
Covenants in leases ; fair rent fixed - - -	210
Covenants running with the land - - - -	210

	PAGE
Death of vendor - - - - -	248
Death of vendor ; enforceability of agreements -	117
Death of vendor (tenant-for-life) - - -	43
Demesne, repurchase of, by tenant-for-life -	230
Distribution of purchase-money - - -	55
Disturbance, compensation for - - -	174
Ejectment for non-payment of rent, estoppel -	89
Ejectment pending fair rent hearing -	151
Estate, declaration of - - - - -	110
"Estate" meaning of - - - - -	41
"Estate": provisional declaration of - -	12
Estates Commissioners, discretion of, as to advances	117
Estates Commissioners, powers of - - -	110
Estoppel - - - - -	89 151, 182
Evicted Tenants (Ir.) Act, 1907 - - -	193, 200
Fair rent, notice to fix - - - - -	89
Fair rent, transfer of proceedings - - -	151
Forfeiture on bankruptcy, of right to inherit -	65
"Former tenant": s. 53 (1) of Act of 1903 -	52
Guarantee by lessor, right of assignee to sue on -	240
Holding sold under prior Purchase Acts ; reserve fund - - - - -	106
Indemnifying lands, right against - - -	129
Interest - - - - -	174
Intervening interest - - - - -	182
Jurisdiction of Estates Commissioners - -	12
LAND ACT (Ir.), 1870 - - - - -	174
LAND ACT (Ir.), 1881 - - - - -	174
s. 57 - - - - -	123
LAND ACT (Ir.), 1889, ss. 14, 34 - - -	123

	PAGE
LAND ACT (IR.), 1898—	
ss. 31 (4), 33 (4) - - - - -	129
s. 32 (3) - - - - -	75
s. 35 - - - - -	243
s. 40 - - - - -	41
LAND ACT (IR.), 1903—	
s. 1 (1, 4) - - - - -	168
s. 3 - - - - -	230
ss. 12, 43 - - - - -	106
s. 15 - - - - -	182
ss. 16, 17 - - - - -	75
s. 17 - - - - -	123
ss. 23, 71 - - - - -	193
s. 24 (4) - - - - -	221
s. 24 (8) - - - - -	55
s. 24 (13) - - - - -	129
s. 48 - - - - -	43
s. 53 (1) - - - - -	52
s. 98 (1) - - - - -	12
IRISH LAND ACT, 1904 - - - - -	43
“Landlord,” meaning of - - - - -	123
Lease: deposit, interest on - - - - -	210
Lease: power to surrender; notice - - - - -	34
Lease: unpaid renewal fines, redemption, priority - - - - -	224
Life annuity; retainer - - - - -	221
Limitation on advances - - - - -	52
Local Registration of Title (Ir.) Act, 1891, s. 34 - - - - -	75
Mines and minerals, reservation of - - - - -	26
“Month,” calendar or lunar - - - - -	34
Notice of surrender of lease - - - - -	34

	PAGE
Originating application, exclusion of part of lands in	110
Originating application ; request to purchase demesne included in - - - - -	248
Power of Land Commission to purchase and resell the demesne to trustees and executors of vendor	248
Practice - - - 43, 47, 114, 165, 182, 221,	224
"Present tenant" - - - - -	151
Prices within the zones - - - - -	1
Priority ; rent ; renewal fines - - - - -	224
Promissory note for arrears of rent - - - - -	99
Provisional declaration of "Estate" - - - - -	12
Purchase of Land Amendment Act, 1888 - - - - -	168
Questions of law - - - - -	193
Real Property Limitation Acts, 1833, 1874 - - - - -	156
Receiver's fees, redemption of - - - - -	114
Redemption of liability for rent - - - - -	129
Redemption of life annuity - - - - -	221
Redemption of rent, priority - - - - -	224
Redemption of superior rent - - - - -	114, 165
Renewable lease : penalty for non-renewal - - - - -	47
Rent ; guarantee by lessor - - - - -	240
Reserve fund, power to advance out of - - - - -	106
Right to compel sale - - - - -	41
Sale of estate to Land Commission - - - - -	1
Sale of portion of estate - - - - -	41
Sale, proceedings for - - - - -	12
Sand not a mineral - - - - -	26
Security ; judicial rent fixed - - - - -	200
Settled Land Act, 1882, s. 50 - - - - -	123
<i>Spes successionis</i> - - - - -	65
Statute of Limitations - - - - -	156

	PAGE
STATUTES—	
3 & 4 Will. IV., c. 27, s. 3	156
3 & 4 Vict., c. 105, ss. 26, 27	174
37 & 38 Vict., c. 57, s. 1	156
44 & 45 Vict., c. 49, s. 48 (2)	129
3 Edw. VII., c. 37, ss. 1, 6	1
Superior interest: redemption	47, 129, 165
Superior rent, redemption of	114
Tenancy created since Jan. 1, 1901	52
Tenant-for-life, selling direct to tenants	123
Tenant refusing to purchase: s. 40 (1896)	41
Tenantry Act	47
Tithe rent-charge; payment by wrong person	156
Title, person having power to sell	65
Town rates; liability	235
Town Tenants (Ir.) Act, 1906; tenancy for "a year certain"	207
Transfer of proceedings	89
Variation of order	75
Vendor, assignor of life estate	123
Vendor not having title to part of lands sold	75
Vesting order, amendment of	182
Vesting order, effect of	75

TABLE OF CASES CITED.

	PAGE
Adnam v. Earl of Sandwith - - -	159
Attorney-General of Isle of Man v. Mylchreest -	29
Ballantine v. Earl of Gosford - - -	92
Barcroft v. Welland - - - -	238
Barton v. M'Fadden - - - -	92
Beaupre's trusts, Re - - - -	69
Belfast (Earl of) v. Chichester - - -	69
Bell v. Wilson - - - -	29
Beully v. Ashley - - - -	104
Bolton v Barry - - - -	216
Borrowes v. Delany - - - -	215
Brown v. Chadwick - - - -	29
Bruce v. Steen - - - -	216
Bruner v. Moore - - - -	35
Burke v. O'Callaghan - - - -	92
Carrickfergus U. D. C. v. Martin - - -	216
Clegg v. Hands - - - -	216
Close, Re - - - -	139
Conolan v. Leyland - - - -	96
Cox v. Hakes - - - -	122
Cramer Roberts' estate - - - -	44, 126
Crosbie's estate, Re - - - -	8, 15
Darvill v. Roper - - - -	29
Davidson v. Allen - - - -	104
Davis v. Glyde - - - -	103
De Voeux v. Mara - - - -	225
Devir, Ex parte - - - -	69

	PAGE
Dixon v. B. & D. Ry. Servants' Society	36
Dolling's Estate, <i>Re</i>	222
Doneraile v. Chartres	50
Donnelly v. Foss	225
Dowling v. Foxall	35
Doyle's estate	44
Dungannon v. Smith	69
Dursley (Lord) v. Fitzhardinge	69
Earl Fitzwilliam v. Wicklow C. C.	44
Earl of Jersey v. Neath Union	29
Elvidge v. Meldon	56
Finlay's Estate, <i>Re</i>	252
Fishbourne v. Hamilton	29
Fleury v. O'Reilly	36
Freeman v. Boyle	50
Fullerton v. Provincial Bank of Ireland	136
Glass v. Patterson	56
Gloster v. Murphy	235
Gorman v. La Touche	92
Gosford v. Irish Land Commission	195
Gover's Case	139
Gracey v. Harrison	179
Gt. Western Ry. v. Blades	29
Harenc's Trustees Estate, <i>Re</i>	135
Harvey v. Copeland	36
Henthorn v. Fraser	36
Hext v. Gill	29
Higden v. Williamson	69
Hill v. East & West India Dock Co.	139
Irish Land Commission v. Brown	216
Irish Land Commission v. Magorian	216

Table of Cases Cited.

xvii

	PAGE
Irish Land Commission <i>v.</i> Massereene	36
Irish Land Commission <i>v.</i> White	159
Johnson <i>v.</i> Hudleston	36
Kearley <i>v.</i> Thompson	246
Kemmis' Estate, <i>Re</i>	139
Kemp. <i>v.</i> Derrett	3 6
King <i>v.</i> Eversfield	208
Knox <i>v.</i> Baxter	216
Lansdowne's Estate, (No. 1) <i>Re</i>	194
Leader, <i>Re</i>	139
Leeks, <i>Re</i>	56
Leonard's estate	42
Listowel <i>v.</i> Gibbings	29
Lucas, <i>Re</i>	56
Lyle's estate	44
M'Chesney <i>v.</i> M'Kee	241
Massereene's Estate, <i>Re</i>	252
Meade's estate	44
Middleton Union <i>v.</i> M'Donnell	104
Miller <i>v.</i> Salomons	139
Mills <i>v.</i> Fox	97
Moth <i>v.</i> Frome	69
Nettles <i>v.</i> Murphy	211
O'Brien <i>v.</i> Leader	176
O'Connor <i>v.</i> Smith	215
O'Shea <i>v.</i> Walshe	102
Owen's Estate, <i>Re</i>	223
Owen's Estate (No. 3)	139
Pakenham <i>v.</i> Williamson	115, 215
Palmer <i>v.</i> Power	235
Papillon <i>v.</i> Brunton	36

	PAGE
Parish v. Sleeman - - - - -	235
Parsons, <i>Re</i> - - - - -	69
Patch v. Ward - - - - -	93
Payne v. Rex - - - - -	104
Powell's Estate, <i>Re</i> - - - - -	252
Provost of Glasgow v. Farie - - - - -	29
Pugh v. Duke of Leeds - - - - -	35
Quartermaine v. Selby - - - - -	36
R. v. Barton - - - - -	136, 196
R. v. Essex - - - - -	180
R. v. Inhabitants of Chawton - - - - -	35
R. (Gosford) v. Irish Land Commission - - - - -	132
Redington's estate - - - - -	125
Regents Canal Co. v. Ware - - - - -	44
Rogers v. Dock Co. - - - - -	36
Scott, <i>Ex parte</i> - - - - -	225
Scottish Union and National Insurance Co., <i>Re</i> - - - - -	19
Sealy v. Stawell - - - - -	60
Shaw v. Earl of Jersey - - - - -	99
Shaw v. Townshend - - - - -	171
Sherlock's estate - - - - -	45, 110
Sidebotham v. Holland - - - - -	35
Slowman v. Walter - - - - -	50
Soames v. Nicholson - - - - -	86
Spencer's Case - - - - -	216
Steele v. M'Call - - - - -	225
Sturges v. Ryan - - - - -	215
Thorpe v. Thorpe - - - - -	69
Todd v. N. E. Ry - - - - -	29
Trefall, <i>Re</i> - - - - -	208
Tucker v. Linger - - - - -	29

Table of Cases Cited.

xix

	PAGE
United Club Hotel Co., <i>Re</i> - - - -	56
Vizard's trusts, <i>Re</i> - - - -	69
Vyvyan v. Arthur - - - -	216
Walton, <i>Ex parte</i> ; <i>Re</i> Levy - - - -	139
Ward v. M'Roberts - - - -	225
Wentworth v. Bullen - - - -	92
Wilkinson v. Gaston - - - -	35
Wilson v. Smyth - - - -	215
Wing v. Harvey - - - -	97
Wright v. Treacey - - - -	208

IRISH LAND REPORTS.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZ-
GIBBON, and HOLMES, L.JJ.)

In the Matter of the Estate of WILLIAM T. J. GUN.

Dec. 9, 10, 1907.—*Land Purchase Acts—
Sale of an estate to the Land Commission—
Estimated price—Basis of estimate—Agreements
for sale between landlord and judicial tenants—
Prices within the zones—3 Edw. VII., c. 37,
ss. 1 and 6.*

APPEAL.
Dec., 1907.

Where an originating request is made to the Land Commission under s. 6 of the Irish Land Act, 1903, to purchase an estate, the Commissioners are not bound to make their estimate of the price which they are prepared to pay upon the basis of prices which have previously been agreed on by the landlord and tenants of the estate, even where such prices would, in the case of the judicial tenancies on the estate, bring the purchase annuities within the provisions of s. 1 (1) of the aforesaid Act. The Commissioners should have regard to

APPEAL. *such prices, but only as evidence of the amount*
Dec., 1907. *which they may safely pay for the estate, having*
regard to the security.

Appeal from a decision of Wylie, J., upon questions of law submitted to him by the Estates Commissioners. The facts are stated in the following judgment of Wylie, J.:—

WYLIE, J.—In this case the absolute owner of an estate, consisting of the townland of Sleveen, in the County of Kerry, made application in the prescribed form to the Land Commission requesting them to enquire into the circumstances of the estate with a view to a sale thereof under s. 6 of the Irish Land Act of 1903. The entire lands were in the occupation of seven tenants, of whom six were judicial and one non-judicial. Each of these tenants had, prior to the originating request, signed an undertaking to purchase his holding from the Land Commission, in the event of the estate being sold, at a price which brought the case of each of the six judicial tenants within what is known as “the zones,” but the prices mentioned in these undertakings were fixed, and these undertakings were signed, without the sanction or authority of the Estates Commissioners, and before they had estimated the price or made an offer to purchase pursuant to s. 6 (1). Due enquiries pursuant to s. 6 were made, and the Estates Commissioners, having considered the report of their inspector and the circum-

stances of the case, made an offer for the estate at a price which was the aggregate of the estimated prices made by them for the several holdings and set out in the schedule to the offer. These prices were in every case save one less than the prices in the above undertakings lodged by the vendor, and were, in fact, such that the purchase annuities would in every case save one be outside the zone limit. The vendor objected to these estimated prices, contending that, as the six judicial tenants had signed undertakings to buy at prices which would bring the purchase annuities within the zones, the Estates Commissioners were, by the provisions of s. 1 (1) of the Act of 1903, bound by these prices, and could not fix any other. Some of the holdings on the estate were protected from a river by an embankment which was within the ambit of the holdings, but which had always been, before and since the fixing of the judicial rents, maintained and repaired by the vendor and his predecessors, and I have no doubt that the judicial rents were fixed on that basis. Prior to these proceedings the vendor and all the tenants, except one, entered into an agreement whereby each of the tenants was, after the sale, to be bound to maintain and keep in repair so much of the embankment as bounded his holding, and the prices mentioned in their said several undertakings to purchase were fixed on that basis. The Estates Commissioners, in their said offer to

APPEAL.

Dec., 1907.

APPEAL
Dec., 1907.

purchase, inserted a condition with reference to this embankment that the vendor should, prior to the agreement for purchase, effect certain specified repairs and improvements thereon. Accordingly, counsel for the vendor, on the one hand, contends that the Estates Commissioners had no power to insert in their offer any such condition, as it would be, in effect, an advance by the Land Commission to the vendor out of the Land Purchase Fund for the improvement of his estate, which, it is contended, would be illegal. Counsel for the Treasury, on the other hand, contends that the transfer of liability to maintain and repair the embankment from the landlord to the tenant by the above agreement takes the cases out of the zone section as to prices, even if the Commissioners were otherwise bound by it as contended for by the vendor. Now, the first question of law submitted to me for decision is this—(1) Whether the price to be offered for the estate, pursuant to s. 6 (1) of the Irish Land Act, 1903, must be estimated upon the basis of the sums opposite to the tenants' names in the second column of schedule to the memorandum submitted by the Estates Commissioners, such sums being within the zones, and being sums at which, prior to lodgment of the originating request, the tenants gave to the vendor undertakings to purchase from the Land Commission, or may the price to be offered be based on the prices estimated by the Commissioners, though differ-

ing from the prices at which the tenants gave undertakings to purchase to the owner before the originating request was lodged? It would be almost enough for me to say that I answer the latter alternative in the question in the affirmative; but as there appears to me to exist a great deal of misconception as to the meaning of the provisions contained in s. 6, and also as to the way in which s. 1 (1), commonly known as the zone section, operates in a section 6 case—i.e., in the case of the sale of an estate to the Land Commission—I would like to state as clearly as I can the view I take as to the meaning and operation of these two sections. If an owner of land wishes to sell his estate to the Land Commission he must proceed under s. 6; and sub-s. 1 of that section provides that—“Where the owner of an estate makes an application in the prescribed form to the Land Commission requesting them to enquire into the circumstances of the estate with a view to a sale thereof, the Land Commission may, after due enquiry, propose to purchase the estate, and, in estimating the price, shall have regard to the foregoing provisions of the Act in respect of advances, and to the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate.” Now, the first thing, therefore, the Land Commission must do before ever *proposing* to purchase is to make due enquiry into the circumstances of the estate, and, as

APPEAL.

Dec., 1907.

APPEAL
Dec., 1907.

is evident from s. 6 (3), they must be careful to buy only on such terms as will enable them to re-sell without prospect of loss. And so, by sub-s. 1, *they* are to estimate the price at which they will propose to buy, and in estimating that price they are required to have regard to the foregoing provisions of the Act in respect of advances. They must, therefore, have regard to the class of persons to whom they can make advances for re-sale—viz., to occupying tenants of holdings, to the several persons mentioned in s. 2, to owners under s. 3, and to trustees, in certain cases, under s. 4. They must have regard also to the fact that the amount of the advance, according to the class of buyer, is limited in amount, and to the fact that by s. 1 (1), if they estimate the price of a holding in the occupation of a judicial tenant at such a sum as will bring the case within the zones, and the tenant afterwards agrees to buy at that price, and applies for the advance, they will be bound to make it. The Commissioners are also required in estimating the price to have regard to the prices which the tenants and *other persons* are willing to give for their holdings and other parcels of land comprised in the estate—i.e., the tenants in respect of their holdings, and other persons of the classes mentioned in ss. 2, 3, and 4 in respect of other parcels of the estate of which they are not tenants. Now, the section makes no distinction between the mode in which they are to have regard to the prices

APPEAL.

Dec., 1907.

which tenants are willing to give, and to those which *non-tenants* are willing to give. Nor does it distinguish between judicial and non-judicial tenants, and yet it has been seriously argued on behalf of the vendor that where all these different classes of persons have signed undertakings to purchase their holdings and other parcels at specified prices, the Estates Commissioners, if they intend to propose to purchase, are bound to accept and adopt the exact prices specified in the undertakings of *judicial* tenants, where they come within the zones, but in all other cases, notwithstanding the undertakings, may estimate different prices. This argument was somehow based on the alleged effect of s. 1 (1), but it seems to me to be overlooked that s. 1 (1), according to its terms, does not apply at all until not only the *estate* is sold, but the holding also, and the purchase-money fixed. I also wish to point out that in s. 6 (1) there is no reference whatever to an undertaking by a tenant or other person to purchase, and it appears to me that undertakings to purchase at that stage are unnecessary; but under s. 6 (2) if the owner agrees to sell the estate at the estimated price, then, unless a certain proportion of the tenants undertake to purchase at the estimated prices, the Land Commission cannot buy, notwithstanding their offer, except under the special circumstances mentioned in sub-ss. 3 and 4, and the fact that the Land Commission cannot

APPEAL.
Dec., 1907.

complete the purchase of the estate unless these undertakings by the tenants to purchase are given affords another reason why it was necessary to provide that the Land Commission, in estimating the price, should have regard to the prices which the tenants were willing to give. In my opinion, therefore, any undertakings signed by tenants to purchase their holdings at specified sums, prior to the price being estimated by the Estates Commissioners, can only be evidence of the prices which such tenants are willing to give for their holdings, and the Estates Commissioners, though bound to have regard to them, are not in any case bound to adopt such prices, but may fix different prices in estimating the price for which they propose to purchase. To the second question—whether the Estates Commissioners in estimating such price as aforesaid must base the same upon such purchase moneys that the annuities thereon will be within the provisions of s. 1 (1) of the Act of 1903?—I answer “No.”

Jellett, K.C., and *E. J. Little*, for the vendor (appellant), cited *In re Crosbie's Estate*, XII. Quarterly Land Reps. 1; [1907] 1 Ir. R. 116; Irish Land Act, 1903, ss. 1 and 6.

The Attorney-General, K.C., *Serjeant O'Connor*, K.C., and *D. White*, for the Treasury, were not called on.

SIR S. WALKER, BART., L.C.—The Estates Commissioners have offered to purchase this

estate from the owner for a specified sum, composed of the amounts which in each case they are prepared to advance to the tenants for the purchase of their holdings. In the case of all the tenants save one these amounts are less than the prices which, prior to the lodgment of the originating request, the tenants had signed agreements to pay. In the case of the judicial tenants, these latter prices are such as would bring the purchase annuities within the "zones" of s. 1 of the Irish Land Act, 1903; and the vendor contends that, therefore, the Commissioners are bound, under s. 1, to take these prices as the basis upon which to estimate the amount which they are prepared to offer for the estate. The provisions of s. 6 of the Act are quite different from those of s. 1. Under the sixth section, which authorises the Land Commission to purchase an estate under certain conditions, the Commissioners are directed to inquire into the circumstances of the estate. In estimating the price, they are to have regard to the foregoing provisions of the Act in respect of advances, and to the prices which tenants and others are willing to pay (s. 1 (1))—that is to say, they are to inquire into these circumstances, but are not to be bound by them. The next sub-section enacts that under certain circumstances the Commissioners may agree to purchase the estate for the estimated price. The whole machinery of the section depends upon an estimated price, and, in my opinion,

APPEAL.

Dec., 1907.

APPEAL.
Dec., 1907.

the view of Wylie, J., is quite right—namely, that the prices agreed on by the landlord and tenants, as a result of direct negotiations between them, are only evidence as to the price which the Commissioners may safely pay, having regard to their duty to obtain adequate security for the money which, on behalf of the State, they may expend in purchasing the estate. To put the matter shortly—a. 1 is based on an obligation, s. 6 on a discretion, for the exercise of which the section points out the materials to be used at every step.

FITZGIBBON, L.J.—I concur. The Commissioners are directed to make an estimate of the price which, as purchasers acting on behalf of the State, they are enabled to offer, and s. 6 points out the materials upon which they are to exercise their discretion as to price. They are, *inter alia*, to have regard to what I may call the “bids” made by the tenants for their holdings; but may they not refuse to give a price for which they consider there is no adequate security? May they not also offer less than the sum agreed on in direct negotiations between landlord and tenant if they think the estate to be security only for the lesser sum? It is clear that they are bound to investigate the security when buying under s. 6.

HOLMES, L.J.—I concur. The sixth section shows that the signing of these undertakings to purchase by the tenants prior to the originating

request is only evidence of the prices which they are willing to pay, and thus affords material for forming the estimate which the Commissioners are directed by the section to make.

APPEAL.
— —
Dec., 1907.

Solicitors for the vendor (appellant) : *Creagh & Byrne.*

Solicitor for the Treasury : *W. Towers.*

[*Note up on pp. 1053 and 1063 of Cherry's Irish Land Act, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZGIBBON
and HOLMES, L.JJ.)

In the Matter of the Estate of MARIA J. WEIR
AND OTHERS.

Dec. 11, 12, 1907 ; Jan. 23, 1908.—*Land*
APPEAL. *Purchase Acts—Irish Land Act, 1903—Proceedings*
Dec., 1907. *for sale under—Provisional declaration—Estate—*
Jan., 1908. *Procedure of Estates Commissioners—Jurisdiction.*

The practice hitherto followed by the Estates Commissioners of making, in the first instance, a provisional declaration under s. 98 (1) of the Irish Land Act, 1903, and postponing the making of a final declaration until the lands are being actually vested in the purchasers, is not warranted by the statute. The determination and declaration under that section is a condition precedent to the carrying out of a sale under the Act. When the Estates Commissioners have made a declaration under s. 98 (1) that an estate is fit to be regarded as a separate estate they are precluded, in cases coming within the zones, from making subsequent inquiries as to whether the holdings are sufficient and adequate security for the purchase-money.

Estate of the Scottish Union and National Insurance Co., XII. Quarterly Land Reps. 92, [1906] 1 Ir. R., disapproved.

Appeal by the vendors from a decision of the
Judicial Commissioner, dated July 5, 1907, on
certain questions submitted for his opinion by
the Estates Commissioners.

APPEAL.

Dec., 1907.

Jan., 1908.

Questions submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The following facts appeared from the minute of the Estates Commissioners :—On Dec. 20, 1904, an originating application had been lodged with the Land Commission dealing with lands which comprised sixty-one holdings, of which fifty-six were held under judicial tenancies, and five were non-judicial, and purchase agreements, signed by all the tenants on Nov. 1, 1904, were lodged in Jan., 1905. On May 25, 1905, the lands were provisionally declared to be an estate. On Nov. 30, 1906, the Estates Commissioners, having been informed that a large amount of arrears had been added to the purchase-money, sent a query to the vendors' solicitors requiring them to furnish (1) a statement showing the amount of arrears which had been added to the purchase-money in the case of each holding, and how such arrears had accrued ; and (2) a statement showing the rent paid by each tenant during the last five years. On Dec. 7, 1906, the vendors' solicitors supplied the particulars required, and further stated that, as the Court of Appeal had held s. 1 (1) of the Act of 1903 to be mandatory, the Estates Commissioners had no jurisdiction, in the case of judicial tenants whose

APPEAL.
Dec., 1907.
Jan., 1908.

purchase annuities were within the zones, to inquire into the security for the amount of the advances. It was further stated that, as regards the arrears, which were calculated to Nov. 1, 1904, a half-year's rent was to be paid in cash, one-half of the balance was to be cancelled, and the other half added to the purchase-money. From the statement furnished by the vendors' solicitors it further appeared that the arrears varied from one year to eleven years, the total arrears amounting to about four years all round, and a subsequent statement by the vendors showed the dates at which the arrears accrued. The Estates Commissioners stated in their minute that it was not their practice to make a final declaration under s. 98 (1) until the same day as and simultaneously with the certificate under s. 17 (1), the vesting of the holdings in the tenant-purchasers, the lodgment of the purchase-money in the Bank of Ireland, and the order attaching claims under s. 24 (1) of the Act of 1903. On these facts the following questions were submitted :—(1) Whether the Estates Commissioners had jurisdiction to require the vendors to furnish, in the case of the fifty-six judicial tenants on this estate, a statement showing the rent paid by each tenant during the last five years required by their requisition dated Nov. 30, 1906? (2) Whether the Estates Commissioners had jurisdiction to consider at all the applications for advances on this estate before a declaration under s. 98 (1) of the Irish Land Act,

1903, had been made by them ? (3) Whether the Estates Commissioners had jurisdiction to take any definitive steps with regard to the sale of this estate under the said Act before making a declaration under s. 98 (1) of the said Act that it was fit to be regarded as a separate estate ? (4) Whether the Estates Commissioners had any jurisdiction under s. 98 (1) of the said Act to issue the provisional certificate dated May 25, 1905, and whether they have power to postpone the exercise of their discretion as to the issuing of a final declaration or certificate under the said section until the day upon which the holdings are to be vested in the tenant-purchasers ?

APPEAL.
Dec., 1907.
Jan., 1908.

Campbell, K.C., and Garrett Walker, K.C., for the appellants.

The Attorney-General, Serjeant O'Connor and D. White for the Treasury.

Ronan, K.C., Jellett, K.C., and De Renzy for the Estates Commissioners.

Cases cited :—*Talbot Crosbie's Estate*, [1905] 1 Ir. R. 570 ; *Estate of the Scottish Union and National Insurance Co.*, XI. Quarterly Land Repts. 92 ; [1906] 1 Ir. R. 42. *Cur. adv. vult.*

SIR S. WALKER, L.C. (having stated the facts).—As to the legality of making what has been called a provisional declaration, and the time and manner of making, under s. 98 (1), a declaration that an estate is fit to be regarded as a separate

APPEAL.
Dec., 1907.
Jan., 1908.

estate for the purposes of the Act, we are told by the Estates Commissioners that it is not their practice to make a final declaration until the same day as, and simultaneously with, the vesting of the holdings in the tenant purchasers and the lodgment of the purchase-money in bank. I have no doubt this practice originated in a desire to convenience vendors and expedite sales, and I need hardly point out how desirable it is, once negotiations with tenants have been initiated and the estate has been taken in hands by the Estates Commissioners, to avoid delay as far as possible. This practice has certainly been followed without question in cases which have come before us, but now that its legality is directly challenged we are bound to decide the point, and, in my opinion, the practice is not warranted by the statute. I think the Act contemplates that the first thing to be done after the filing of the originating application, and after all preliminary inquiries material to guide their judicial discretion have been made, is to declare the lands, or such part of them as the Commissioners may think right, a separate estate for the purposes of the Act. Till that has been done they have no subject-matter to operate on in the way of sanctioning or making advances or carrying out the sale. I do not think it necessary to express an opinion as to whether they could in any case, and at any stage, recall a declaration once made. In the second place, I think it clearly follows that, once the Commissioners

have made the declaration they have no jurisdiction afterwards, when applications for advances of State money are made to them by tenants who have agreed to buy at zone prices, to consider whether these would be sufficient security for the payment of the annuities fixed consequent on such zone prices. They have, however, the duty imposed on them by s. 1 (1), to have regard to the limitations as to the amount of advances to tenants under the Act, and also to be satisfied that the tenant is in occupation of the holding. All that involves, as was said by FitzGibbon, L.J., in *Talbot Crosbie's Estate*, the duty and right to ascertain that every tenancy sold is a real tenancy, and not one created conditionally or for the mere purpose of getting money from the State. That view, in this particular case, furnishes an answer to one of the questions put to us. Thirdly, I do not think it is possible, even in cases which are presented to the Estates Commissioners as within the zones, to lay down any hard and fast rule as to what inquiries may be made or information demanded by the Commissioners before they exercise their judicial discretion in declaring lands, the subject of an originating application, fit to be regarded as a separate estate for the purposes of the Act. These words, "for the purposes of the Act," include all the steps which follow the declaration, save so far as these are regulated and controlled by legislation. Section 1 (1) contemplates two stages—(1) the making of the declara-

APPEAL.

Dec., 1907.

Jan., 1908.

APPEAL.
Dec., 1907.
Jan., 1908.

tion, and (2) the making of the application for, and sanction of, the advance, and both the subdivisions (a) and (b) of the sub-section mention conditions to which regard must be paid. It is the duty of the Commissioners to ascertain whether the "holding," the "judicial rent," and "existing rent" are all real, and not manufactured with a view to getting money from the State, and it is impossible to say that the arrears due on the estate, and the manner in which the rents had been paid, might not also be useful guides to the exercise of their discretion. If the estate was found to be covered by ejectment decrees unexecuted, it would form a subject for consideration. I quite agree that, when once real factors are found on which zone prices have been arranged, the presumption of security for payment of the annuities arises, and when these circumstances exist before the declaration comes to be made I do not think the Commissioners can do indirectly what they could not do directly, and ground a non-exercise of their discretion on the insufficiency of the security for the annuities. In the case referred to, of *Estate of the Scottish Union and National Insurance Co.*, no declaration was made by the Estates Commissioners under s. 98, but still, I think, the decision went too far, so far as it laid down that a refusal to make the declaration could be based on the specific ground that there was no security for the annuity. In judging of the action of the Estates Commissioners in the present case we

must bear in mind that the decision of Meredith, J., which was not appealed from, was binding on them. The answers which, in my judgment, should be given to the four specific questions submitted to Mr. Justice Wylie in the present case are as follows :—No. 1 raises a concrete case, and in answering it we are bound to assume on the facts, first, that a declaration, provisional though it was, had been made ; and secondly, that the object of the Estates Commissioners in their requisition was to see whether security existed for the advance and annuities. Under those circumstances the answer should be in the negative. The answer to No. 2 should be in the affirmative. It is impossible to lay down categorically that there are any definite steps which might be taken, and in most cases should be taken, before making this declaration. What these steps are must depend upon the circumstances of each case. As to No. 3, save so far as regards any definitive step which the Estates Commissioners might consider material or necessary to take, for the purpose of arriving at a determination whether the lands were fit to be regarded as a separate estate for the purposes of the Act, the answer must be in the negative. It follows from what I have already said, the answer to No. 4 should also be in the negative.

APPEAL.

Dec., 1907.
Jan., 1908.

FITZGIBBON, L.J.—I wish we could have given written answers to the four questions, which would not only have been clear and complete,

APPEAL. but would also have explained their grounds and
Dec., 1907. scope sufficiently to have made any observations
Jan., 1908. from me unnecessary. There is no difference of
opinion amongst the Court, and the multiplication of concurring judgments involves the risk of supplying arguments for limiting or extending the effect of what is really the unanimous judgment of the Court. Question 4 is the only one which we can answer categorically "yes" or "no." Question 1 is the only one which is specifically answered upon the evidence as to the actions of the Estates Commissioners in the particular case of *Weir's Estate*. The terms of questions 2 and 3 are general, if not abstract, and we have found it necessary to answer one of them with a proviso and the other with an exception. I will take the last question first. I hold that the determination and declaration under s. 98 (1), by the Estates Commissioners, that lands are fit to be regarded as a separate estate for the purposes of the Act of 1903, is a condition precedent to putting the provisions of the Act into execution for the purpose of carrying out a sale of those lands under that Act. In short, the declaration under s. 98 (1) is the foundation of the jurisdiction to proceed with the consideration of the application for advances or with the sale of the lands. In order to make the judicial determination expressed in the declaration, that the lands are fit to be regarded as a separate estate, it is the duty of the Estates Commissioners to make every inquiry and to

obtain all information which they may reasonably consider to be material, and I must disclaim any intention to put any limitation upon such inquiry or information *a priori* by saying that anything can necessarily be regarded as irrelevant in all cases. The scope of the inquiry cannot be limited by definition. It includes the title and tenure of the lands as well as their character and situation and physical quality, and it includes also the relations between the parties interested, as the purchasing tenant and the selling landlord. Among the most important of all subjects of inquiry—in fact, what the Lord Chief Baron called the cardinal matter—is the ascertainment whether the proposed sale is a real transaction. I repeat what I said in *Crosbie's Estate*, that the most important matter upon which the Estates Commissioners are not only at liberty, but are bound, to satisfy themselves is that the sale of the holdings, on the terms arranged, has been honestly made, and that there is no fraud or concealment. If not satisfied on these points they ought not to declare any lands fit to be regarded as a separate estate for the purposes of the Act, and they must be satisfied of that, and must say so, not provisionally, but by way of judicial determination, before they can take any step, in exercise of the jurisdiction, which only arises when the declaration has been made, to consider the application for advances or otherwise to carry out the provisions of the actual sale. But once the jurisdiction attaches

APPEAL.

Dec., 1907.

Jan., 1908.

APPEAL.
Dec., 1907.
Jan., 1908.

for the purposes of the Act, the provisions of the Act apply, and they must be obeyed by the Estates Commissioners, as well as by everybody else. We therefore answer question 4 by saying that the provisional declaration was illegal. I will next take question 1. Amongst the matters excluded from the consideration of the Commissioners by s. 1 (1) in every case to which it applies are the two considerations which do fall within their province under sub-s. 2, but when, and only when, the provisions of sub-s. 1 have not been complied with—viz., (a) whether they are satisfied with the security, and (b) whether they consider the agreed price to be equitable. It has been forgotten that these considerations are, or might be, on opposite sides of the account. A price so high that the instalments may not be secure concerns the Treasury, but a price so low as to be reckless concerns the vendor, and is equally excluded. The plain effect of sub-s. 1 is to make a certain fixed proportion between the agreed price and the previously fixed judicial rent conclusive evidence for the purposes of the Act that it was a fair price, sufficiently secured on the one hand and not inequitable on the other. In such cases the section provides that the Estates Commissioners shall make the advance. Consequently they have no jurisdiction or right to require information for the purpose of refusing it on the ground that the security is insufficient, it being clearly proved that their only object in asking the question asked in question 1 in this

case is to obtain information with a view to determining whether the security was or was not sufficient in a case to which sub-s. 1 applied.

APPEAL.

Dec., 1907.

Jan., 1908.

We therefore answer that question in the negative on the facts of the case; but that answer must not imply that similar or other questions must in other circumstances be irrelevant to the question whether other lands should or should not be considered a suitable estate for the purposes of the Act. In this case, the proposal of the Estates Commissioners to buy the estate themselves, if the vendors would sell it to them at a reduced price, was wholly inconsistent with the existence in their minds of any doubt whatever that it was fit to be regarded as a separate estate for the purposes of the Act. Our answer to question 2 is a general declaration that it is only as an element for the purpose of determining whether the estate is fit to be regarded as a separate estate, but not for the purpose of ascertaining what s. 1 (1) puts outside the jurisdiction of the Commissioners, that they are to take into consideration the applications for advances made in this case. The answer to No. 3 simply declares, with the same limitations, that no steps are to be taken towards the sale before the jurisdiction has been attached by a declaration under s. 98. On the facts of this particular case it is plain that many important duties and expensive steps were taken by the Estates Commissioners which were far beyond the stage at which it ought to have been ascertained definitively, that the

APPEAL.
Dec., 1907.
Jan., 1908.

lands were fit to be regarded as a separate estate for the purposes of the Act. In other words, these were steps taken on the second stage of the journey before the first had been completed. The only redress for the consequences of having taken those steps, now that it was ascertained that in fact the ground on which the Commissioners directed them to proceed was one not within their jurisdiction, would be to make the provisional declaration absolute, and to proceed with the sale, of course without prejudice to any other question of jurisdiction which has not been determined provisionally or otherwise.

HOLMES, L.J., who also concurred, read the full replies which the Court thought should be given to the questions submitted to Mr. Justice Wylie. The answers were as follow :—(1) It appearing from the correspondence that preceded the reference to the Judicial Commissioner, and it being also admitted by counsel for the Estates Commissioners that their object in requiring the vendor to furnish the statement in this question set forth was to consider whether the holdings of the fifty-six tenants therein referred to were sufficient and adequate security for the purchase-money agreed by the landlords and tenants to be paid therefor, this question is answered in the negative. (2) Provided, and to the extent that, the consideration of the applications for advances on this estate was not for the purpose of ascertaining whether the said fifty-six holdings

were sufficient and adequate security for the purchase-money agreed on by the landlords and tenants, the Estates Commissioners had jurisdiction to consider the applications for advances as an element in determining whether the estate was fit to be regarded as a separate estate. (3) The question will be answered in the negative, save so far as regards any definitive steps which the Estates Commissioners may consider it material or necessary to take for the purpose of arriving at a determination whether the lands are fit to be regarded as a separate estate for the purposes of the Act. (4) This question is answered in the negative.

APPEAL.
—
Dec., 1907.
Jan., 1908.

Solicitors for vendors : *Wm. C. Hogan & Sons.*

Solicitor for the Treasury : *W. G. Towers.*

Solicitor for the Estates Commissioners : *Wm. Alexander.*

[*Note up on p. 1152 of Cherry's Irish Land Act, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZ-
GIBBON and WALKER, L.JJ.)

STAPLES v. YOUNG.

APPEAL. Dec. 17, 1907; Jan. 20, 1908.—*Land Purchase—Reservation of the benefit of mines and minerals—Sand—Ordinary agricultural holding—Sand not always a mineral.*

Although in some cases sand may be a "mineral" within a reservation of mines and minerals, the question whether in a particular case it is or is not a mineral within such a reservation depends upon the context and upon the nature of the transaction, having regard to all the circumstances of the case.

Where a grant of certain lands in 1672 reserved to the grantor the benefit of all mines and minerals, and in 1905 the tenant of part of these lands, who had had a fair rent fixed, opened a sand-pit and persisted in digging sand and selling it at a profit, and at the trial of the action, brought by the owner of the grantor's interest for an injunction to restrain him from so doing, evidence was given that practically the whole soil of this holding consisted of sand :

Held, that, on the facts of the case, the sand was

not a mineral within the reservation in the grant, for, inasmuch as practically the entire soil of the holding consisted of sand, there would be nothing left for the grant to operate upon if that sand were to be considered within the reservation.

APPEAL.

Dec., 1907.

Jan., 1908.

Appeal from a decision of Ross, J. (sitting for the Chancery Division), dated July 12, 1907, pronouncing judgment for the plaintiff in an action brought to obtain an injunction restraining the defendant, his agents and servants from raising and taking away sand from the lands of Brackville, in Co. Tyrone. The plaintiff in the action was owner of a moiety of a fee-farm rent of £4 issuing out of the lands, and claimed to be entitled to the benefit of all mines and minerals. His title was a very old one, going back to the time of Charles I. A grant was made by one Sir Andr w Stuart to John Nicholson in 1632, and it was in 1672 confirmed by a grant from the Earl of Suffolk and others. This grant reserved a rent of £4 and the ben fit of all mines and minerals and other royalties. By a Landed Estates Court Conveyance dated April 26, 1864, the yearly fee-farm rent of £4, and the use and benefit of the mines and minerals, and the benefit of all other royalties whatsoever, were granted to Sir Thomas Staples and James A. Caulfield. The plaintiff was the successor-in-title of Sir Thomas Staples. The defendant bought the tenant's interest some years ago, and in 1903 he had a fair rent fixed in respect of the

APPEAL.
Dec., 1907.
Jan., 1908.

holding at £3 13s. It appeared from the evidence that there were many undoubted minerals in the district, such as brick-clay and coal, and that these had been worked for many years, and leases of them made from time to time. As to the particular holding in respect of which the action was brought, expert evidence was given as to the nature of the soil and sub-soil, which may be summarised as follows :—There was an agricultural surface of about eight and a half to ten inches composed for the most part of sand. Below this agricultural surface was a zone of sand which would not be useful for building purposes because it was impregnated with vegetable matter, and would, therefore, retain damp; but below this again there was sand which is suitable for building purposes. At this point there was pure sand, and still further down there was a belt of blue clay. Evidence was given that the actual surface of the soil, which was described as a sandy soil, consisted as to five-sixths of sand and one-sixth of vegetable matter. In 1905 or 1906 the defendant opened a sand-pit on the lands, and, in defiance of the plaintiff, persisted in taking away the sand out of his holding and selling it at a profit. An action for an injunction restraining him from so doing having been brought by the plaintiff, the sole question for the determination of the Court was whether the reservation in the deed of 1672, of the benefit of mines and minerals and other royalties, included the sand. For the defendant it was contended

that the four-acre farm in question consisted substantially of sand and nothing more, and that the sand, being the subject-matter of the grant, could not at one and the same time be reserved. Ross, J., considered that he was bound by the decisions in *Fishbourne v. Hamilton*, 25 L. R. Ir. 483, and *Earl of Jersey v. Guardians of Neath Union*, 22 Q. B. D. 555, and held that the plaintiff was entitled to the injunction claimed. The defendant appealed.

APPEAL.

Dec., 1907

Jan., 1908.

James O'Connor and *Devitt* for the appellant.

Jellett, K.C., and *H. Poole* for the respondent.

Cases cited :—*Brown v. Chadwick*, 7 Ir. C. L. R. 101; *Bell v. Wilson*, L. R. 1 Ch. App. 303; *Listowel v. Gibbings*, 9 Ir. C. L. R. 223; *Tucker v. Linger*, 21 Ch. D. 32; *Att.-Gen. of Isle of Man v. Mylchreest*, 4 A. C. 294; *Darvill v. Roper*, 3 Dr. 294; *Fishbourne v. Hamilton*, 25 L. R. Ir. 483; *Earl of Jersey v. Guardians of Neath Union*, 22 Q. B. D. 555; *Hext v. Gill*, L. R. 7 Ch. App. 699; *Great Western Railway v. Blades*, [1901] 2 Ch. 624; *Todd v. North Eastern Railway*, [1903] 1 K. B. 603; *Provost of Glasgow v. Farie*, 13 A. C. 657.

Cur. adv. vult.

SIR S. WALKER, L.C.—The question in this action is whether the plaintiff, who is the owner of certain reservations of the benefit of all mines and minerals contained in a deed of 1672, is entitled to restrain the defendant from removing sand from the lands in respect of which the

APPEAL.
Dec., 1907.
Jan., 1908.

reservation was made. [His lordship stated the facts, laying stress on the point that the lands were held as an ordinary agricultural holding in respect of which a fair rent had been fixed.] The arguments addressed to us covered a wide range of cases, some of which are of a conflicting character, but there are principles to be deduced from them by which we should be guided. In *Hext v. Gill*, Mellish, L.J., sums up the previous authorities thus: "A reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." In other words, the question must be determined upon the construction of the words used in the grant, taking into account all the circumstances of the case, and in the case now before us I think we are driven to base our decision on the special facts. In *Att.-Gen. of Isle of Man v. Mylchreest* the law is clearly stated by Sir Montague Smith—"It was contended for the Crown that the word 'minerals' used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and

popular meaning which would not embrace such substances, and it may be shown by any of the above-mentioned modes of explanation that in the particular instrument to be construed it was employed in this narrower sense."

[His lordship referred to the long series of cases cited, particularly to *Provost of Glasgow v. Farie*, *Earl of Jersey v. Neath Union*, *Great Western Railway v. Blades*, and *Todd v. North Eastern Railway*, and said that all these cases should be considered together for the purpose of applying the decisions therein to the present case.] As to *Earl of Jersey v. Neath Union*, the case is valuable for the observations of Bowen, L.J. He adopts the words of Mellish, L.J., in *Hext v. Gill*, and says—"The rule there laid down is a rule which arises directly from the character of the transaction, and is a sound rule of construction, unless there is something in the context to throw light upon and alter it." In *Great Western Railway v. Blades*, Buckley, J., points out at p. 632 that in cases depending upon the Railways Clauses Act, 1845, different considerations apply from those which arise in a case where the relations between the parties exist by contract or grant. Having referred to *Earl of Jersey v. Neath Union*, he says—"The judgments in that case show me, as I think, that the true principle to apply is that accepting the decision in *Hext v. Gill* as being good law, and assuming that a mineral *primâ facie* includes anything lying in the land which has a value of its own

APPEAL.

Dec., 1907.
Jan., 1908.

APPEAL.
Dec., 1907.
Jan., 1908.

as being capable of being used independently of the land, yet that that rule must bend, as Bowen, L.J., said, or may be modified, as Fry, L.J., said, by the circumstances of the case, and that what I must look to is to see whether in the nature of this transaction, and having regard to all the circumstances of this case, the word 'minerals' does in the case now before me extend to include the clay in question." And upon examination of the facts in that case he comes to the conclusion that the clay which was alleged to be a mineral within the meaning of the Act was the soil, and, treating it as the soil, he held that it was not a "mineral" within the meaning of the Act. "The six inches or so of decomposed vegetable matter on the surface is not in this place the soil any more than in a room the carpet can be said to be the floor." In the later case of *Todd v. North Eastern Railway Co.*, Halsbury, L.C., treated the case as governed by *Provost of Glasgow v. Farie*. The value of the decision is that it adopts the judgment of Buckley, J., in *Great Western Railway Co. v. Blades*, and I think that is sufficient to dispose of the point we have before us. [His lordship dealt in detail with the expert evidence that had been given as to the nature of the soil in the present case, which was described as "a sandy soil."] In my opinion there would be nothing left for the grant to operate upon if it were held that this sandy soil or sub-soil was captured by the reservation of the benefit of all

mines and minerals. The real object of the parties to the grant is best attained by holding that in this case sand is not a mineral. While admitting that in some cases sand may be a mineral, we hold that, on the special facts of this particular case, it is not. The appeal will, therefore, be allowed and the action dismissed.

APPEAL.

Dec., 1907.
Jan., 1908.

FITZGIBBON and HOLMES, L.JJ., gave judgments to the same effect.

Solicitors for the appellant : *Brown & M'Cann.*

Solicitors for the respondent : *French & French.*

[*Note up on p. 58 of Cherry and Wakely's Land Acts, 3rd Edition, 1903; and on p. 1070 of Cherry's Irish Land Act, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZ-
GIBBON and HOLMES, L.JJ.)

WILKINS v. M'GINITY.

APPEAL.

Oct., Nov.
1907.

Oct. 31, Nov. 4, 1907.—*Landlord and tenant—Lease for a term—Power of surrender at end of two years—Three months' notice—Tenancy commencing on Nov. 1—Notice to surrender on Nov. 1 received by landlord on Aug. 1—Interpretation—Calendar months or lunar months.*

Where a lease for a term of years, commencing on Nov. 1, contains a proviso that the tenant may surrender the lease at the end of two years from the commencement of the tenancy on giving beforehand three months' notice to the landlord, a notice of surrender to give up possession on Nov. 1, which is served on the landlord on Aug. 1 of the second year of the term, will be sufficient to terminate the tenancy ; but proof of the posting of a notice of surrender at such a time that it would, in the ordinary course, reach the landlord on Aug. 1 will not be enough to create a surrender.

Per FITZGIBBON, L.J.—A notice to surrender on Oct. 31, if served on July 31, would also be good.

The question whether months in such a document means calendar or 'lunar months discussed.

Appeal from an order of the King's Bench

Division [Lord O'Brien, L.C.J., and Johnson, J.; Wright, J., dissenting]. The facts are reported in XI. Quarterly Land Rep. 143.

APPEAL.
Oct., Nov.,
1907.

D. Henry, K.C., and *Donaldson* for the defendant (appellant).—The term commenced on Nov. 1: *Pugh v. Duke of Leeds*, 1 Cowper 714; *Wilkinson v. Gaston*, 9 Q. B. 137; *Sidebotham v. Holland*, [1895] 1 Q. B. 378. The use of the words “beforehand” and “at the expiration” in the lease excludes the operation of the rule that a notice to quit, or to surrender, on the day on which the tenancy commenced will be good. The two years ended on Oct. 31 and, therefore, the notice of surrender was late. “Month” in this lease means calendar month: *R. v. Inhabitants of Chawton*, 1 Q. B. 247.

[FitzGIBBON, L.J.—“Half-yearly” means six months in the document, so that month in that connection evidently means calendar month, and I think the same interpretation should be given to the term three months.]

We submit that the English authorities do not apply. “Month” in Deasy’s Act means calendar month; so also in the old Irish statutes regulating ejectments: *Dowling v. Foxall*, 1 Ball & Beatty 193. The lease should be construed in accordance with the statutes which regulate it.

Chaytor, K.C., and *Hanna* for the plaintiff (respondent).—“Month” in legal documents, other than mercantile, means lunar, not calendar, month: *Bruner v. Moore*, [1904] 1 Ch. 305;

APPEAL.
Oct., Nov.,
1907.

Johnson v. Hudleston, 4 B. & C. at p. 932; Furlong, Vol. I., p. 629. The use of the term "half-yearly" in the context does not exclude this rule: *Rogers v. Dock Co.*, 12 W. R. 1101. The term began on Nov. 2. "From" should be construed exclusively (Stroud's Legal Dictionary, Vol. II., p. 778), especially as such construction is in case of the party bound by the clause: *Irish Land Commission v. Massereene*, [1904] 2 Ir. R. at p. 513. A notice to quit on the anniversary of the day on which a tenancy commenced is good: *Sidebotham v. Holland*, at p. 383; *Quartermaine v. Selby*, 5 T. L. R. 223; *Harvey v. Copeland*, 30 L. R. Ir. 412; *Fleury v. O'Reilly*, 40 Ir. L. T. R. 125; *Dixon v. B. & D. Ry. Servants Society*, [1904] 1 K. B. 444; *Kemp v. Derrett*, 3 Campbell 510; *Soames v. Nicholson*, [1902] 1 K. B. 157; Furlong, Vol. I., p. 609; Woodfall, p. 375; Foa, pp. 556, 557. The same reasoning applies to a notice of surrender. The tenant's notice of surrender ought to have reached the landlord on Aug. 31, and the fact that it was posted in time to do so is enough: *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Papillon v. Brunton*, 5 H. & N. at p. 518.

Henry, K.C., in reply.—The observation of Farwell, J., in *Bruner v. Moore*, at p. 316, shows that the tenant cannot rely on the fact that notice was posted in time. He must prove delivery.

Cur. adv. vult.

Judgment was delivered on Nov. 4.

SIR. S. WALKER, BART., L.C.—In this case the parties stipulated that the tenant should have an option of surrendering his lease at the end of two years from the commencement of the tenancy upon giving three months' notice beforehand of his intention to do so. The question which we have to decide is whether or not the notice was served in time. It was argued that the tenant must be taken to have complied with the terms of the contract because he posted the notice at such a time that it ought, in any view of the case, to have reached the landlord three months before the end of the second year of the tenancy; but it was not within the contemplation of the parties that the post should be used as the medium for effecting service of the notice in question, and I think that *Henthorn v. Fraser* is an authority for holding that it is not enough merely to post a notice of this kind (see the judgment of Kay, L.J., at p. 36). As I am also of opinion that the term commenced on Nov. 1; I have now to consider whether a notice served on Aug. 1, to surrender possession on Nov. 1, was sufficient to create a surrender. In answering that question I shall assume that "month" in the agreement means calendar month; but, even if that be so, I think that the notice was served in time. There is no distinction in this respect between a notice to quit and a notice to surrender, and we have the authority of *Sidebotham v. Holland*, and Furlong's Landlord

APPEAL
Oct., Nov.,
1907.

APPEAL.
Oct., Nov.,
1907.

and Tenant, as well as the English text-books, for saying that a six months' notice to quit, terminating on the anniversary of the day on which the term commenced, is good.

FITZGIBBON, L.J.—I concur. Although I shall not attempt to decide this case upon the point as to the meaning of the word month, I wish to say, in regard to that question, that we are entitled to look at the nature and subject-matter of the agreement in order to construe its terms. The question is one of considerable practical importance, and, for my part, I think that there is enough in the agreement before us, taking into account its nature and subject-matter, to show that in it "month" means calendar month. As to the second point raised by counsel for the respondent, I am clearly of opinion that each year of the term began on Nov. 1 and ended on Oct 31, and so on *de anno in annum* during the continuance of the term. That brings me face to face with the question, what is a good notice to quit? because, in construing the document before us, no distinction can be drawn between a notice to quit and a notice of surrender. There are two forms of notice to quit, both equally good. A notice to quit terminating on the last day of a term is good; and I am also satisfied that, where a term ends on the last day of a month, notice to quit on the first day of the following month is good likewise, because it must be remembered that

the moment when the demise ends is the first stroke of the clock at midnight on the last day of the month. Getting notice on the first of a month to go out on the first of a succeeding month—provided the requisite number of months intervene—gives the tenant the full period which the law requires, and to which his contract entitles him. As to the last branch of the argument of counsel for the respondent, I think that posting the notice was not a sufficient compliance with the contract, because it was not a question of binding the tenant, but of bringing his intention to the notice of the landlord. In such a case posting is not enough unless authorised by statute, and even then it is necessary to prove, as in cases under the Parliamentary Voters Act, that the letter or document was posted at such a time that it would, in the ordinary course of post, reach the hands of the person for whom it was destined within the time specified. In this case the sending of the notice by post was not authorised either by statute or by the contract, and there is a finding of fact that it did not reach the landlord till Aug. 1.

APPEAL

Oct., Nov.,
1907.

HOLMES, L.J.—I concur. In the construction of ordinary legal instruments, such as that before us, month means lunar month. This is the rule at common law ; and, although it has been abrogated as regards statutes, and altered by custom in the case of mercantile documents,

APPEAL
—
Oct., Nov.,
1907

it still holds good in other cases unless an intention that the word should bear another meaning can be inferred from the instrument in which it is used. In the agreement before us the evidence to that effect depends on the use of the term "half-yearly," and is, in my opinion, scarcely strong enough to warrant us in reading month as calendar month. I do not, however, base my decision on this point, as I entertain no doubt on the question that three calendar months' notice of intention to surrender the premises on Nov. 1 was sufficient to determine the tenancy. This follows from the principle laid down in Furlong's work on Landlord and Tenant, which has also the authority of the English text writers on that subject, and has recently been applied in *Fleury v. O'Reilly* to the analogous case of a weekly tenancy. I do not attach any importance to the use of the word "beforehand" in the agreement before us, it appears to me to be used merely as equivalent to "previous."

Solicitor for the plaintiff (respondent): *Robert Espinasse.*

Solicitor for the defendant (appellant):
A. N. Sheridan.

[*Note up on pp. 217 and 220 of Cherry's Irish Land Acts, 3rd Edition, 1903.*]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION—LAND JUDGES.

(Before Ross, J.)

GUILFOYLE'S ESTATE.

July 23, 1907.—*Land purchase—Section 40—*
Tenant refusing to purchase—Sale of portion of
estate—Meaning of "estate"—Loss of right to
compel sale.

LAND
JUDGES.

July, 1907.

A landlord who sells to the tenants portion of the estate mentioned in an order for sale loses the right to compel any of the remaining tenants to purchase under the Land Law (Ireland) Act, 1896, s. 40 (1) (d).

Application to deem a tenant to have accepted the offer made to him under the Land Law (Ireland) Act, 1896, s. 40 (1) (d). All of the holdings, except four, upon this estate comprised in the order for sale, had been sold to tenants seven or eight years ago. A new request had now been issued as to these four remaining tenancies, and three of the tenants had accepted the offers made to them; the remaining tenant, Michael Tierney, being dissatisfied with the terms offered to him, still refused to purchase. His holding was slightly more than one-fourth in rateable value

LAND
JUDGES.
July, 1907.

of the four tenancies which had remained unsold, but was much less than one-fourth of the tenancies comprised in the original order for sale, and it was now sought to compel him to accept the offer made to him.

Oulton, K.C., in support of the application.

A. Clery, for M. Tierney, the tenant.—There is no jurisdiction to make the order: *Leonard's Estate*, [1897] 1 Ir. R. 447.

Ross, J.—Where an estate is being sold under s. 40, and some of the tenants refuse to purchase, two courses are open—either the minority of the tenants, if less than one-fourth in number and value, may, on the estate being sold as a whole, be compelled to purchase under sub-s. (1) (d); or else they may be left out of the sale and a portion of the estate sold to the tenants willing to purchase. If the latter course is adopted, all further right to compel any tenant on the estate to purchase is lost. I must, therefore, refuse the application with costs.

Solicitors for the applicant: *Longfield, Kelly & Armstrong*.

Solicitor for M. Tierney: *Louis O'Dea*.

[*Note up on p. 585 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of MARIA L. EYRE
POWELL.

Nov. 5, 1907.—*Land Purchase Acts—Practice—*
Vendor tenant-for-life—Death of, prior to com-
pletion—Bonus—To whom payable—Irish Land
Act, 1903, s. 48—Irish Land Act, 1904.

LAND
COMMISSION.
Nov., 1907.

The tenant-for-life of an estate, who had entered into agreements with the tenants for the sale to them of their holdings under the Irish Land Act, 1903, died before the estate had been declared to be a separate estate, and the holdings vested in the purchasing tenants, and the proceedings were continued in the name of the successor-in-title. On the question arising as to whom the "bonus" should be paid to :

Held, that the sale which had been carried out was a sale effected by the agreements entered into by the tenant-for-life, and that the "bonus" should be paid to her executor.

Question arising on allocation. The estate had been sold under the Irish Land Act, 1903, pursuant to purchase agreements entered into between Mrs. Maria L. Eyre Powell, the tenant-for-life, and the purchasing tenants, bearing date

LAND
COMMISSION.
Nov., 1907.

Sept. 29, 1904, and Nov. 1, 1904. The originating application was lodged on Nov. 23, 1904, and the purchase agreements were lodged on Dec. 22, 1904. By order dated Feb. 24, 1905, the Estates Commissioners provisionally declared the lands comprised in the originating application to be an estate. Mrs. Eyre Powell died on Feb. 11, 1907, having by her will appointed Mr. Richard A. MacNamara as her sole executor. The order vesting the holdings in the purchasing tenants was made on March 7, 1907, and was endorsed on the agreements so entered into by the said Maria L. Eyre Powell and the tenants as aforesaid. On April 29, 1907, an order was made continuing the proceedings in the name of Thomas V. Powell, as her successor-in-title. A question now arose as to whether the bonus should be paid to R. A. MacNamara as executor of the original vendor or to Thomas V. Powell.

Mr. Serjeant O'Connor and Hugh Kennedy for the executor of Mrs. Eyre Powell.

Jellett, K.C., and G. FitzGibbon for Thomas V. Powell.

Authorities cited :—*Meade's Estate*, XI. Quarterly Land Reps. 188, 40 Ir. L. T. R. 124; *Earl Fitzwilliam v. Wicklow County Council*, 40 Ir. L. T. R. 180; *Doyle's Estate*, XII. Quarterly Land Rep. 156, 41 Ir. L. T. R. 47; *Lyle's Estate*, XII. Quarterly Land Rep. 222, 41 Ir. L. T. R. 112; *Cramer Roberts' Estate*, XII. Quarterly Land

Rep. 249, 41 Ir. L. T. R. 192; *The Regents Canal Co. v. Ware*, 23 Beav. 575; *Sherlock's Estate*, [1899] 2 Ir. R. 561.

LAND
COMMISSION.
Nov., 1907.

WYLIE, J.—This case has been very fully argued, and as I have no doubt on the point in my own mind I do not think it necessary to reserve judgment. The question is who is entitled to the bonus payable under s. 48 of the Act of 1903 and s. 3 of the Act of 1904. The facts are shortly as follows:—Mrs. Powell, as tenant-for-life, entered into agreements with her tenants for the sale to them of their holdings under the provisions of the Act of 1903, and at the time of her death these agreements had been carried on up to the stage when the only thing that remained to be done in order to complete the sale was for the Estates Commissioners to declare the lands fit to be regarded as a separate estate. Now, I am dealing with a case where the sale has been completed. It is a sale effected by the agreements entered into by Mrs. Powell as tenant-for-life, under the powers conferred on her as such tenant-for-life. That is the sale that has now been completed, and no other. That being so, the question is who is the vendor to whom the bonus is payable? I have been referred to s. 17 by Mr. Jellett, but it seems to me that that section, if it has any bearing on the case, is strongly against his argument, because it provides that where a person can show a *prima facie* right to sell,

LAND
COMMISSION.
Nov., 1907.

the Estates Commissioners can vest the lands, although that it may turn out that that person is not the proper owner at all. Once the parties have agreed to sell, and taken the proper steps to give the Estates Commissioners jurisdiction in the matter, it rests with the Estates Commissioners to carry out the agreements without the intervention of the vendor or tenants. In this case I have no doubt that the vendor was Mrs. Powell, who sold as tenant-for-life, and she was the only person to whom I could pay the bonus under s. 48, free, under s. 3 of the Act of 1904, from all charges. The money will, accordingly, be paid to her executor.

Solicitor for executor: *Richard A. Mac-Namara.*

Solicitors for Thomas V. Powell: *Moore, Keily & Lloyd.*

[*Note up on pp. 1105 and 1160 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of MARKHAM R. L.
MARSHALL.

Nov. 5, 1907.—*Land purchase—Practice—* LAND
Superior interest—Redemption—Renewable lease— COMMISSION.
Renewal fines—Penalty for non-renewal— Nov., 1907.
Tenantry Act.

The vendor of an estate which was being sold under the Irish Land Act, 1903, held the lands under an indenture of renewal of a lease for lives renewable for ever, and the Court had ordered the redemption of the lessor's interest and fixed the redemption price. The lease provided for the payment of a renewal fine on the fall of each life and for the payment by the lessee of a penalty for non-renewal, but no fines had been paid or renewals obtained since the cestuis que vie named in the said indenture of renewal had died, which was prior to the vesting of the lessor's interest in the predecessors-in-title of the present owners :

Held, that the owners of the superior interest were entitled to the penalties, and should not be compelled to accept, in lieu thereof, the septennial fines which had accrued since the vesting of the lessor's interest in their predecessors-in-title with interest thereon.

LAND
COMMISSION.
Nov., 1907.

Question arising on allocation. The lands sold in this matter were held by the vendor under an indenture of renewal of lease for three lives therein named, dated March 28, 1853 (being a renewal of a lease for lives renewable for ever, dated Jan. 28, 1808), subject to a yearly adjusted rent of £101 2s. 8d. and a renewal fine of £5, late Irish currency, equivalent to £4 12s. 3½d. present currency, on the fall of each life. The said indenture of renewal contained a special provision that if the lessee should not, within twelve calendar months after the death of any of the *cestuis que vie* therein named, pay the said fine of £4 12s. 3½d. present currency he should, for every calendar month for which he should neglect to do so, forfeit and pay unto the lessor a sum of 5s. as a penalty for not renewing the said lease. The interest of the lessor became vested in Joseph Gubbins and Francis Wise Low, as co-heirs of Francis Wise, on his death in Dec., 1881. By indenture of assignment dated May 18, 1888, Joseph Gubbins assigned his undivided moiety to the said Francis Wise Low. The said Joseph Gubbins died on Feb. 20, 1895, having previously made his will, and thereby appointed executors and trustees thereof. The said Francis Wise Low died on Aug. 14, 1904, having by his will devised the said lands upon trust for his wife, Sara Louisa Low, during her widowhood, and bequeathed all arrears of rent, including proportion to date of his death, of each estate passing under the provisions of his will,

to the persons or person to whom such estates should respectively so pass upon his death. An order for redemption having been made the rent, which, under the provisions of the Renewable Leasehold Conversion Act would have been the fee-farm rent if the lease was being converted into a fee-farm grant, had been ascertained and the redemption price fixed. A sum of £254 had been retained in Court to meet claims in respect of renewal fines or penalties since the death of Francis Wise in Dec., 1881. The three lives mentioned in the said indenture of renewal were those of the then King of Hanover, who died on June 12, 1878, and of Elizabeth Purcell and Francis Allen, as to whose death no evidence had been produced by the lessees. The examiner had refused to allocate the sum retained without an order of the Court, holding that he had no jurisdiction to decide from what date the penalties should be calculated or to make any presumption as to when the said Elizabeth Purcell and Francis Allen died. The present application was for an order that the retainer should be discharged; that the sum of £28 10s., being one moiety of penalties that had become payable between Dec. 31, 1881, and March 28, 1888, should be paid to the executors of the will of Joseph Gubbins; and that the sum of £201, being the other moiety thereof, together with all penalties which had accrued between the last-mentioned date and July 12, 1907, should be paid to the said Sara Louisa Low. Counsel for the vendor now con-

LAND
COMMISSION.
Nov., 1907.

LAND
COMMISSION.
Nov., 1907.

sented that all the lives should be presumed to have died prior to Jan. 1, 1880, but contended that the claimants were only entitled to the septennial fines calculated octennially, with interest thereon.

A. V. Matheson for Sara Louisa Low.—We are not claiming for fines, but only for penalties : *Doneraile v. Chartres*, 1 Ridgway 22.

Frank FitzGibbon for executors of Joseph Gubbins.

J. H. Russell for the vendor.—The only dispute is as to amount. The sum payable by the vendor should be the amount of the septennial fines, with interest. The penalty is only intended to secure due performance of covenant to pay fines, and a Court of Equity would declare that claimants are not entitled to penalties on being paid all fines with interest. As to whether penalties are in the nature of assessed damages, see rules and notes to *Slowman v. Walter*, White & Tudor, Vol. 2, p. 257. These fines should be calculated at the end of every eighth year, as the lease allows a period of twelve months for payment after fines become due : *Freeman v. Boyle*, 2 Ridg. P. C. 83. The case is different from one where a lessee is seeking to obtain a fee-farm grant. In this case we are not actually taking out a fee-farm grant ; it only became necessary to ascertain the fee-farm rent for the purpose of redemption.

WYLIE, J.—The lessees are in the same position

as if they were actually taking out a fee-farm grant, and the claimants are, as regards the penalties claimed, in the position of persons who would be entitled to the fines which fell due on the fall of the lives mentioned in the renewal lease, although they cannot claim these fines as they became payable before the lessor's interest vested in their predecessors-in-title. *Doneraile v. Chartres* was followed in a number of cases, of which there are several reported in 4 Ir. Eq. Rep. and 5 Ir. Eq. Rep. The claimants are entitled to the penalties.

LAND
COMMISSION,
Nov., 1907.

Solicitors for Sara Louisa Low : *Stephen Gordon & Sons.*

Solicitors for the executors of the will of Joseph Gubbins : *Milward, Jones & Cameron.*

Solicitors for the vendor : *Macgillicuddy & Morphy.*

[*Note up on p. 1132 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of THOMAS FAIR
RUTTLEDGE.

LAND
COMMISSION.
Nov., 1907. Nov. 12, 1907.—*Land Purchase—Limitations
on advances—Tenancy created since Jan. 1, 1901—
Court letting—Former tenant—Irish Land Act,
1903—Section 53 (1).*

An estate which was being sold under the Irish Land Act, 1903, had been (with other lands) the subject of a petition for sale in the Land Judge's Court that had been dismissed out of court in May, 1902, and the tenant of a holding comprised in the said estate who had been a court lessee pending the matter, and who, after the dismissal of the petition, had remained in possession of the holding, paying the same rent without any new agreement, applied to the Land Commission for an advance of £2,615 for the purchase of his said holding. On a question arising as to whether the provisions of s. 53 (1) limiting advances in the case of tenancies created after January 1, 1901, applied :

Held, that the tenancy was one created after January 1, 1901, but that the tenant was exempt from the provisions of s. 53 (1), being a "former

tenant" within the meaning of the proviso therein contained.

LAND
COMMISSION.
Nov., 1907.

Question of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner. From the memorandum the following facts appeared:—Martin May signed an agreement dated Jan. 9, 1905, for the purchase of his holding, comprising 107 acres 3 roods 31 perches of the lands of Ballyargadoun, held at a rent of £120, and applied for an advance of £2,615. The holding was situate in an administrative county, which comprised a congested districts county. The holding was formerly comprised in the estate of Charles B. Jenings, owner, J. E. Chapman, petitioner, which was for sale in the Land Judge's Court. By lease dated May 26, 1900, the Land Judge let the holding to Martin May, the present tenant-purchaser, for seven years, from March 25, 1900, pending the matter, at the yearly rent of £120. By order dated May 12, 1902, the Land Judge dismissed the petition for sale as regards the lands then unsold, which included Martin May's holding. By indenture dated Aug. 18, 1902, Mary E. Jenings (in whom all the estate and interest of Charles B. Jenings were then vested) conveyed the lands comprised in Martin May's holding with other lands to the vendor absolutely. On the petition for sale being dismissed as aforesaid, the said lease from the Land Judge to Martin May determined, but

LAND
COMMISSION.
Nov., 1907.

Martin May remained in possession of the holding and continued to pay the said rent of £120 to Mary E. Jenings, and subsequently to the vendor, without any new agreement. On these facts the following questions were submitted :—
(1) Is the tenancy of Martin May in the said holding a tenancy created after Jan. 1, 1901 ? and if the answer be in the affirmative, (2) Is Martin May a “former tenant” within the meaning of s. 53 (1) of the Irish Land Act, 1903, and, as such, exempt from its provisions as to limitation of the amount of the advance that could be made to him for the purchase of his holding ?

Herbert Wilson, K.C., for the vendors.

Dudley White for the Treasury.

WYLIE, J.—I will answer question (2) first. I am clear that both at and after the date of the purchase agreement Martin May was a former tenant within the meaning of the proviso in s. 53 (1). It is, therefore, unnecessary to answer question (1), but I will do so in the affirmative, as I am clearly of opinion the tenancy of Martin May in the said holding was a tenancy created after Jan. 1, 1901.

Solicitors for the vendor : *Whitney & Moore.*

Solicitor for the Treasury : *W. G. Towers.*

[*Note up on p. 1117 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of the RIGHT HON.
JAMES FRANCIS EARL OF BANDON.

Nov. 14, 19, 1907.—*Land Purchase Acts—Distribution of purchase-money—Arrears of rent payable to vendor—How calculated—Irish Land Act, 1903, s. 24 (8).*

LAND
COMMISSION.
Nov., 1907.

“ Arrears of rent ” means rent behind in payment, and, accordingly, in calculating the arrears due in respect of holdings on an estate purchased under the Irish Land Act, 1903, for the purpose of ascertaining the sum payable out of the purchase-money in respect of arrears under s. 24 (8), such arrears must be calculated up to the gale day preceding the purchase agreements, and not (by apportionment) to the dates of the agreements.

Question arising on the settlement of the final schedule of incumbrances in respect of an estate sold under the provisions of the Irish Land Act, 1903. The first item on the final schedule provided for arrears of rent under s. 24 (8), and the

LAND
COMMISSION.
Nov., 1907.

question was raised whether these arrears should be calculated to the gale day prior to the purchase agreements or (by apportionment) to the dates of the purchase agreements. It appeared that in the former case the amount would be £656 6s. 9d., and in the latter £827 5s. 10d. The lands sold in this matter were not settled lands, but the trustees of the vendor's settled estates appeared to argue the question, as a similar point would arise in connection with the settled estate, which had also been sold under the Irish Land Act, 1903.

Conner, K.C., and *A. M. Sullivan* for the vendor.

Jellett, K.C., and *Darley* for the trustees of the settled estates.

Authorities cited :—*Re United Club Hotel Co.*, 60 L. T. 665 ; *Re Lucas*, 55 L. J. Ch. 101 ; *Glass v. Patterson*, [1902] 2 Ir. 660 ; *Elvidge v. Meldon*, 24 L. R. Ir. 91 ; *Re Leeks*, [1902] 2 Ir. R. 339.

WYLIE, J.—In this case a question of some difficulty and of great importance, affecting the distribution of the purchase-money of estates sold, has been referred to me for decision by the examiner. Though the Act has now been in operation for four years, and the question must have been decided by the examiners in very

many cases, and the purchase-money distributed accordingly, no one has thought fit, up to the present, to take exception to the examiner's rulings. In this case, however, the title to a considerable sum of money depends on the answer to the question, and, as in these cases practically only one side is represented before the examiner, he has raised the question himself on his rulings. The question shortly is, what is the meaning of the words "arrears of rent" in s 24 (8) of the Land Act of 1903? That sub-section provides as follows:—"In the case of the sale of an estate, where at the date hereinafter mentioned arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. The afore-said date shall be, in the case of an estate purchased by the Land Commission, the date of the agreement for that purchase, and, in the case of an estate purchased by other persons, the date of the agreement for the purchase of the holding." Now, as I have already stated, the question I have to decide is, what is the meaning of the words "arrears of rent were due" in the above sub-section? Do they mean rent due up to the gale day next preceding the dates of the agreements mentioned in the sub-section and at said dates remaining unpaid, or do they include an

LAND
COMMISSION.
Nov., 1907.

LAND
COMMISSION.

Nov., 1907.

apportioned part of the current gale up to said dates? Now, what I have to construe is not the words "where rent was due or had accrued due," but the words "where *arrears* of rent were due." Are the expressions "rent due," or "rent accrued due," and "arrears of rent due," synonymous? Do they convey the same meaning? Probably, prior to the Apportionment Acts, they would have expressed the same idea, as rent then was never considered due until it was payable. But I must now take it as well settled by *Glass v. Patterson*, [1902] 2 Ir. R. 660, and other cases binding on me, that, since the Apportionment Act of 1870, rent must be considered not only as accruing from day to day, as provided by s. 2 of that Act, but as accruing *due* from day to day, so that at any particular period in the currency of a gale a proportionate part of that gale is due or has accrued due, and therefore it would now be correct to speak of that part as so much "rent due." But then s. 3 of the same Act provides that such apportioned part shall only be payable and recoverable in the case of a continuing rent when the entire portion, of which such apportioned part shall form part, shall become due and payable, and, in the case of a rent determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not been determined and not before. Therefore, under the Apportionment Act, though an apportioned

part of a gale of rent is due or has accrued due at a particular date, it is not payable or recoverable at that date. How can rent be properly said to be in *arrear* until it is *payable*? I have been referred to no authority that covers this question, nor have I been able to find any, so, in the absence of any authority, I must answer the question for myself as best I can; and, in my opinion, "*arrears* of rent" means rent behind in *payment*. Therefore, construing sub-s. 8 by itself, I would hold, notwithstanding the Apportionment Act, that the *arrears* of rent that were due at the date of the agreements for purchase in this case did not include the apportioned part of the gale of rent commencing at the gale day next preceding the date of the agreements. But the words "*arrears* of rent" occur in other sections of the Act of 1903, and also in prior Land Purchase Acts with which the Act of 1903 is to be construed. By s. 35 of the Act of 1896 it is provided that where an agreement for the purchase of a holding is . . . lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including "all rent and *arrears* existing at such date." Now, what is the meaning of "all rent and *arrears*"? To what do the words "rent" and "*arrears*" respectively apply? Can "rent" apply to anything

LAND
COMMISSION.
Nov., 1907.

LAND
COMMISSION.
Nov., 1907.

else except the portion of the current gale up to the date of the agreement, and "arrears" to so much of the preceding or earlier gales as remained unpaid? The only case which I have been able to find in which the words "rent and arrears of rent" received a construction by the Court is the case of *Sealy v. Stawell*, Ir. R. 2 Eq. 326, where a tenant-for-life of a certain estate devised it to the remainderman "with all rent and arrears of rent due on said property at his death," and the question was raised whether the apportioned part of the accruing gale passed under the bequest? The Master of the Rolls, in construing the clause, decided that the accruing rent was included in the gift, and said: "It is difficult to give a meaning to the word 'rent' as distinguished from 'arrears of rent' except by holding that it applies directly to the apportioned share of the accruing rents." Now, s. 35 of the Act of 1896, as well as s. 24 (8) of the Act of 1903, applies to the case I am now dealing with, and reading them together, as directed by s. 100 of the Act of 1903, they would run as follows:—The purchaser shall, in the event of the sale being carried out, be discharged from "all rent and arrears" existing at the date of the agreement, but in case of the sale of an estate, where, at the date of the agreement for the purchase of a holding, "arrears of rent" were due in respect of the holding, a sum equivalent in amount to those arrears, not exceeding one

year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. If, therefore, I am right in my construction of the words "rent and arrears" in s. 35, it follows, I think, from reading this section with sub-s. 8, which omits the word "rent," that the words "arrears of rent" in this sub-section were not intended to include an apportioned part of the current gale of rent. The words "arrears of rent" also occur in several other sections of the Land Purchase Acts—for example, in s. 40 (1) (b) of the Act of 1896, s. 7 (5) of the Act of 1903, and s. 77 (2) of the same Act—with reference to sales by the Land Judge under the Land Purchase Acts, and it is to be noticed that the words used in all these sections are "arrears of rent" and not "rent and arrears" used in s. 35 (1) of the Act of 1896. The distinction between the two cases is, I think, accounted for by the fact that, according to the practice of the Land Judge, the current gale was not apportioned on a sale, but passed in its entirety to the purchaser, and the words "arrears of rent" were used to describe the rent due up to the preceding gale day and remaining unpaid. There is, however, one other point referred to in the arguments of counsel that I cannot pass by without some notice. It was contended that this case came within s. 50 of the Landlord and Tenant Act, 1860, which provides that, when a tenancy determines,

LAND
COMMISSION.
—
Nov., 1907.

LAND
COMMISSION.
Nov., 1907.

otherwise than by the act of the landlord, at any time before a gale day, the landlord shall be entitled to an apportioned part of the rent. There is nothing in this section, as there is in the Apportionment Act, to postpone the time of payment. Therefore, if the conditional determination of the tenancy, in this case, by the sale of the fee-simple by the landlord to the tenant, were a determination otherwise than by the act of the landlord, within the meaning of s. 50, I think the apportioned part of the gale of rent would, so far as that section is concerned, become an arrear of rent at the date of the agreement; but s. 35 of the Act of 1896 provides that in such a case neither the rent nor arrears can be recovered pending the carrying out of the sale. I do not think, however, it is necessary for me to decide whether s. 50 applies to this case or what its effect would be if it did, because what I have to decide is the meaning of the words "arrears of rent" as used in s. 24 (8) of the Act of 1903, and in that sub-section the words in question are applied to two distinct cases—one, the case of a direct sale of the fee-simple to the tenant, and the other, the case of a sale of the estate to the Land Commission, where the tenancy in the holding continues, and, as in the latter case, I am of opinion, for the reasons already given, that the words "arrears of rent" mean rent due up to the gale day next before the date of the agreement and remaining unpaid, I think the same

meaning must be given to them when applied to the former case, and the amount of those arrears must be ascertained accordingly.

LAND
COMMISSION.
Nov., 1907.

Solicitors for the vendor : *Clifford & Lloyd*.

Solicitors for the trustees : *Maunsell, Darley & Orpen*.

[Affirmed by the Court of Appeal (Sir S. Walker, L.C., FitzGibbon and Holmes, L.JJ.)]

[*Note up on p. 1085 of Cherry's Irish Land Act, 1903.*]

1

IRISH LAND REPORTS.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZGIBBON
and HOLMES, L.JJ.)

Estate of ROBERT P. D. SPENCER CHICHESTER, a
Vendor of Land.

Dec. 5, 1907 ; Jan. 27, 1908.—*Land purchase—
Title—Person having power to sell—Forfeiture on
bankruptcy—Spes successionis.*

APPEAL.

Dec., 1907.
Jan., 1908.

By a will lands were limited to certain trusts and (inter alia) upon trust for Lord Spencer Chichester for life, and subject thereto upon trust for the person who should at the death of Lord Spencer Chichester be Marquis of Donegall (if he should not then be, or subsequently become, bankrupt) and his heirs in tail, and subject thereto upon trust for the first and every other son of Lord Spencer Chichester in tail male. At the death of Lord Spencer Chichester, in 1901, the then Marquis of Donegall had been a bankrupt many times over. The last adjudication was in Nov., 1889, from which he obtained his discharge in 1896, and in July, 1900,

APPEAL
Dec., 1907.
Jan., 1908.

all the other bankruptcies then outstanding were annulled, although upon the death of Lord Spencer Chichester the Marquis informed the trustees that he was still hopelessly insolvent, and thereupon Robert P. D. Spencer Chichester, the eldest son of Lord Spencer Chichester, entered into possession. An originating application for sale of part of the lands under the Irish Land Act, 1903, having been lodged by Robert P. D. Spencer Chichester, his power to sell was challenged on behalf of the infant Marquis of Donegall on the ground that under the limitations of the will the late Marquis, upon the death of Lord Spencer Chichester, not being then a bankrupt, took the estate to himself and his heirs in tail, and, not having subsequently become bankrupt, the estate passed to the infant Marquis as his heir in tail :

Held (reversing the decision of WYLIE, J.), that Robert P. D. Spencer Chichester was not a person having power to sell, but that the infant Marquis was entitled.

Appeal on behalf of the Marquis of Donegall, a minor (by his mother, as next friend), from a decision of Wylie, J., dated July 8, 1907, on a memorandum referred to him by the Estates Commissioners under s. 23 (1) of the Irish Land Act, 1903. The question submitted for the decision of the learned judge was—"On the true construction of the will referred to in the said memorandum in the events which have happened, as therein stated, is the above-named vendor

(Robert P. D. Spencer Chichester) a person having power to sell under the Land Purchase Acts ? ” The material part of the will in question and the circumstances of the case are fully stated in the following extracts from the judgment in the Court below and in the judgment of the Court of Appeal :—

APPEAL.

Dec., 1907.
Jan., 1908.

WYLLIE, J.—By her will, dated Dec. 10, 1889, Lady Dorcas Chichester devised the lands for sale in this matter to trustees upon trust, for her brother, the then Marquis of Donegall, if he should not at the time of her death be or become bankrupt, &c., for his life, or until he should become bankrupt, &c., and after the failure or determination of the trust, upon trust for her brother, Henry Fitzwarrine Chichester, if he should not at the time of her death be or become bankrupt, &c., for his life, or until bankruptcy, &c.; and after the failure or determination of the trust, upon trust for Lord Spencer Chichester during his life, and after his death “upon trust for the person who should at his decease be Marquis of Donegall, if he should not then be or subsequently become bankrupt, or have done or suffered anything whereby the rents and profits would, if belonging absolutely to him, have become vested in or payable to some other person;” and upon failure of that trust, upon trust for the first and other sons of Lord Spencer Chichester in tail male. The testatrix died on Mar. 8, 1890. Prior to the making of the will her brother, the then Marquis of Donegall, had been several times adjudicated a bankrupt, the last adjudication being on Nov. 1, 1889. On July 9, 1896, the said Marquis obtained his discharge from this bankruptcy, and on July 16, 1900, all other bankruptcies then outstanding were annulled. At the death of the testatrix her brother, Lord Fitzwarrine Chichester, was also a bankrupt, and Lord Spencer Chichester thereupon entered into possession as tenant-for-life under the will, and so continued to his death, on March 5, 1901, when his eldest son, the present vendor, entered into possession as tenant-in-tail. The late Marquis of Donegall died on May 13, 1904, leaving

APPEAL.

Dec., 1907.
Jan., 1908.

an only son, the present Marquis. The question submitted to me is whether, on the true construction of the will, and in the events that have happened, is the vendor entitled to the lands? The contention of the vendor is that, under the circumstances stated, the lands would at the death of Lord Spencer Chichester, if they had belonged to the then Marquis of Donegall, have become vested in his trustees under the bankruptcy of 1889. On the other hand, the present Marquis contends that the gift in the will to the person who should at the death of Lord Spencer Chichester be Marquis of Donegall, did not, during Lord Spencer Chichester's life, confer such a contingent estate as would vest in the trustees in bankruptcy, but a mere expectancy or *spes successionis*, which would not pass to the trustees. It is impossible to construe this will apart from the facts of the case. There was, at the date of the will, as appears from the will itself, and also at the death of the testatrix, a Marquis of Donegall who, if he survived Lord Spencer Chichester, would at the latter's death be Marquis of Donegall and the person entitled to the lands under the devise if the forfeiture did not apply. The only contingency, therefore, affecting the interest of the late Marquis was his surviving Lord Spencer Chichester. His interest was not a mere expectancy or *spes successionis*, such as would under the devise be taken by any subsequent Marquis. I think, on the facts, the will must be construed as if it ran—"And after the death of Lord Spencer Chichester upon trust for the present Marquis of Donegall, if he be then living, but if he be then dead for the person who shall then be Marquis of Donegall." In my opinion, the estate or interest taken under the will by the late Marquis was, apart from forfeiture, such a contingent estate as would pass to his trustee under the bankruptcy of 1889. Therefore, if the trustee in the bankruptcy of 1889 had not, as I must assume, at the date of the death of Lord Spencer Chichester, sufficient property of the late Marquis in his hands to discharge all claims in that bankruptcy, the forfeiture clause in this will became operative, and the vendor is entitled to the lands and has power to sell.

There was a further contention in the Court

below that, even if the interest conferred was such a contingent estate or interest as would pass to a trustee in bankruptcy, it vested, in this case, in the trustees or assignee under one of the bankruptcies prior to that of 1889, and that, on their annulment in 1900, it reverted to the late Marquis and not to the trustee under the bankruptcy of 1889. Wylie, J., decided against this contention also, but, as it was not relied on in the Court of Appeal, his judgment on that point is omitted. All the bankruptcies were English ones.

APPEAL

Dec., 1907.

Jan., 1908.

G. FitzGibbon (Jellett, K.C., with him) for the appellant.—A bare possibility or *spes successionis* will not vest in the assignees: Griffith's Bankruptcy, Vol. I., p. 259; Bankruptcy Act, 1883, ss. 44, 168; *Dungannon v. Smith*, 12 Cl. & F. 546; *Moth v. Frome*, Amb. 394; *Higden v. Williamson*, 3 P. W. 132; *Lord Dursley v. Fitzhardinge*, 6 Ves. 251; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 439; argument of Sugden at 483; *Re Parsons*, 45 Ch. D. 51; *Ex parte Devir*, 18 Q. B. D. 660; *Re Vizard's Trusts*, 1 Ch. App. 588.

Bonan, K.C., Henry, K.C., and Macrory, for the respondent, cited *Thorpe v. Thorpe*, 32 L. J. Exch. N. 8. 79; *In re Beaupre's Trusts*, 21 L. R. 1r. 397.

Cur. adv. vult.

SIR S. WALKER, L.C.—Lord Justice FitzGibbon will read the judgment of the Court.

APPEAL. **FITZGIBBON, L.J.**—This is an appeal from a decision of Mr. Justice Wylie on a question submitted to him by the Estates Commissioners, whether R. P. D. Spencer Chichester had power to sell certain lands as a vendor under the Land Purchase Acts. Our decision will rule, as far as this Court is concerned, the title to all the real estate of Lady Dorcas Chichester, part of which R. P. D. Spencer Chichester has agreed to sell to the tenants. Mr. Justice Wylie decided that the vendor was a competent vendor under the Purchase Acts. The appeal is brought on behalf of the infant Marquis of Donegall, claiming that he is now entitled to the lands as tenant in tail in possession. The decision depends upon the application to the terms of the will of Lady Dorcas, which bears the hall mark of Lincoln's Inn, and to the pecuniary circumstances of certain members of the Donegall family, of the law of bankruptcy, and of the subtle distinction in the law of contingent remainders between a "possibility," coupled with an "interest" which would pass to assignees in bankruptcy, and "a bare possibility," which would not do so until it vested in possession. Lady Dorcas Chichester was the sister of Edward, the late Marquis of Donegall, the father of the present claimant. By her will she appointed her brother, Lord Spencer Chichester, and William Dawson, of Lincoln's Inn, to be trustees of her will; and she devised all her real estate at Dooish, in Donegal, which included the lands in question and all her

other real estate, unto and to the use of the said trustees, their heirs and assigns, upon certain trusts. The first was "upon trust, if my brother, the present Marquis of Donegall, shall not at the time of my death be a bankrupt, to pay the rents and profits to my said brother during his life, or until he shall become bankrupt." The next trusts, which were of a similar character, were for successive life estates under like restrictions to, first, Lord Fitzwarrine Chichester, and subsequently Lord Spencer Chichester. The trust on which the question now arises is:—"Upon trust for the person who shall, at the decease of the said Lord Spencer Chichester, be Marquis of Donegall (if he shall not then be or subsequently become bankrupt, or have done or suffered anything whereby the said rents and profits would, if belonging to him, have become vested in or payable to some other person or persons), and his heirs in tail general, according to their respective seniorities; and upon the failure or determination of the trust lastly hereinbefore contained my trustees shall stand possessed of the said real estate upon trust for the first and every other son of the said Lord Spencer Chichester successively according to their seniorities in tail male, with remainder in tail general, with remainder to Lord Spencer Chichester in fee-simple." The present vendor was the first son of Lord Spencer Chichester, and therefore to take the estate he must show that the trust for the person who at the death of

APPEAL.

Dec., 1907.

Jan., 1908.

APPEAL.
Dec., 1907.
Jan., 1908.

Lord Spencer Chichester was Marquis of Donegall (i.e., the appellant's father), and his heirs in tail general had failed or determined. On the death of the testatrix in 1890, her brother, the then Marquis of Donegall, was a bankrupt. He had, in fact, been several times adjudicated a bankrupt, and neither had he been discharged nor had any of his bankruptcies been annulled. Therefore he did not answer the description in the will. Lord Fitzwarrine, the second life-tenant, was also a bankrupt when the testatrix died, and, therefore, on March 6, 1890, Lord Spencer Chichester became, and during his life continued to be, entitled as *cestui que trust* in possession to the rents and profits. The trusts for the Marquis and for Lord Fitzwarrine having failed to vest at the appointed time could not afterwards be revived. Lord Spencer having become life-tenant in possession could not be displaced by annulment of his brother's bankruptcies or otherwise. The same failure to answer the description or satisfy the conditions of the will, which prevented the Marquis from taking the life interest at the death of the testatrix, prevented him from taking anything under the remainder-in-tail. No estate, interest, or property, present or future, vested or contingent, as tenant in tail could pass to him, or through him to his assignees in bankruptcy, so long as he was bankrupt. Lord Spencer died on March 5, 1901, and the memorandum stated that on his death the Marquis informed the trustees that he

was still "absolutely insolvent." Lord Spencer's eldest son, the present "vendor," was allowed to enter into receipt of the rents and profits, and his title was not challenged until after the death of the late Marquis, when the claim on behalf of the infant appellant was put forward. On July 16, 1900, all the bankruptcies against the late Marquis had been annulled, and he became capable of answering the description of the *persona designata*, who was to take on Lord Spencer's death. The Marquis, not being then bankrupt, took the estate to himself and his heirs in tail general, and, not having subsequently become bankrupt, it passed on his death to the appellant, his only son and heir-in-tail. The present vendor had not acquired any title in the meantime, and accordingly the order of Mr. Justice Wylie must be discharged, and the question put to him in the memorandum must be answered in the negative. [His Lordship dealt in detail with the authorities cited, and said there was no case in which a mere possibility or *spes successionis*, such as, in the present case, the late Marquis had during the life of Lord Spencer Chichester, had ever been held to be capable of passing to assignees in bankruptcy, and referred particularly to Griffith's Bankruptcy, Vol. I., 259; *Moth v. Frome*, *Dungannon v. Smith*, *Belfast v. Chichester*, and Preston's Conveyancing, p. 48. The interest was not one capable of passing to the assignees, and, upon Lord Spencer Chichester's death, the late Marquis, not being then a bank-

~~Arrai.~~

Dec., 1907.

Jan., 1908.

APPEAL.
Dec., 1907.
Jan., 1908.

rupt, took under the limitation over to himself and his heirs-in-tail, and accordingly the present Marquis was now entitled.] The present proceedings having been taken by Mr. Robert Chichester as "vendor" for his own benefit, under a claim of title, which has failed, he must pay the costs of the infant Marquis on appeal, but as the order of the Court below as to costs was made by consent it must stand. Though the present decision is conclusive, so far as the opinion of this Court is concerned, it does not finally bind the estate, as the opposite conclusion might in effect have done, the present proceeding being a summary one under the Land Purchase Acts, which enables the Land Commission to sell property irrevocably on what is called a *prima facie* title, which might afterwards be held bad by the House of Lords in an action on the title in the High Court.

Solicitors for the appellant: *Moore, Kiely & Lloyd.*

Solicitors for the respondent: *T. T. Mccredy & Son.*

[*Note up on pp. 1077 and 1104 of Cherry's Irish Land Act, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZGIBBON
and HOLMES, L.JJ.)

In the Matter of the Estate of HUGH GILMER
WILSON

Feb. 6, May 5, 1908.—*Land Purchase Acts—* **APPEAL.**
Vesting order—Effect of—Lands included which Feb., May,
vendor had not a title to sell under the Acts— 1908.
Variation of order—Irish Land Act, 1903, ss. 16
and 17—Land Law (Ir.) Act, 1896, s. 32 (3)—
Local Registration of Title (Ir.) Act, 1891, s. 34.

A vendor sold to a tenant, under the Land Purchase Acts, a holding, including a strip of land, as to which he had not got such title as would enable him to sell under the Acts. Notice of that fact was given by the real owners to the Land Commission, but the latter, nevertheless, dealt with the vendor under s. 17 of the Act of 1903 as the owner, and made an order vesting the entire holding in the tenant, and made the usual order under s. 24 (1) attaching all claims to the purchase-money :

Held (FITZGIBBON, L.J., dissenting), that the vesting order was valid, and could not be altered or corrected “without injury to any person,” and that the remedy of the real owners of the strip

APPEAL.
Feb., & May,
1908.

wrongfully disposed of was to intervene in the distribution of the purchase-money.

Motion on behalf of the Urban District Council of Carrickfergus that the vesting order of the lands made in this estate to George P. Kirk, the purchasing tenant, be varied and amended by excluding therefrom a strip of land, containing 3 roods and 13 perches, statute measure, held by the vendor under the Urban District Council of Carrickfergus, under a tenancy from year to year, at the yearly rent of 6s. 5½d., representing 7s. late Irish currency. It appeared that the originating application filed pursuant to the provisions of the Irish Land Act, 1903, stated that the lands, which were the subject-matter of the sale, and which were all comprised in one holding in the occupation of the said George P. Kirk, at a judicial rent of £24, fixed by order dated Feb. 29, 1888, were held by the vendor under an indenture of fee-farm grant dated Oct. 13, 1686, and made between the Mayor, Aldermen and Burgesses of the town of Carrickfergus of the one part and Matthew Johnson of the other part. The said fee-farm grant reserved a rent of 11s. 6d. (Irish), and included other lands (not the property of the vendor) besides those sold in this matter. The total rent payable to the Urban District Council by the vendor in respect of the lands sold was 17s. 1d., made up of the aforesaid rents of 11s. 6d. (Irish) and 7s. (Irish). It appeared from an entry in the books of the old Corporation of

Carrickfergus that the tenant had an equitable right to a lease for 99 years from May 1, 1808, of the strip of land in dispute. The notice of intention to treat the vendor as entitled to deal with the lands was dated April 26, 1907. By letter dated May 8, 1907, the Urban District Council set forth the aforesaid facts relating to the said strip, and objected to its being included in the lands about to be sold by the vendor, on the ground that the vendor did not come within the definition of those who have powers to sell under the provisions of the Irish Land Act, 1903, being either a tenant from year to year of the said 3 roods and 13 perches, or at the most with an equitable right to a lease which would have expired on May 1, 1907. On May 27, 1907, the Estates Commissioners wrote to the solicitors for the Urban District Council stating that they were satisfied that all the lands were held by the vendor under the fee-farm grant, and on May 23, 1907, made an order vesting the entire holding in the purchasing tenant, paid the money into the bank, and made the order attaching claims. The vendor was willing to redeem the rent of 7s. (Irish) at seventy-two years purchase, but the Urban District Council refused to consent to the sale, and brought forward the present application.

APPEAL

Feb., May,
1908.

Andrews for the Urban District Council.

Whitaker, K.C., for the purchasing tenant.

Matheson, K.C., and *Osborne* for the vendor.

APPEAL.
Feb., May,
1908.

SIR S. WALKER, BART., L.C.—The Land Act of 1903 contains very drastic provisions with regard to the vesting of lands at an early period of the negotiations, and before the title is properly investigated, leaving persons with rights to assert their claims against the purchase-money. The question in this case was whether the Urban Council of Carrickfergus were driven to assert their claim with respect to the 3 roods 13 perches against the purchase-money, or whether, as Mr. Justice Ross had held, they were entitled to have that plot excluded from the vesting order. [His Lordship states the facts.] There was no doubt that Mr. Wilson and Mr. Kirk believed that all the land sold was included in the fee-farm grant of 1686. Under these circumstances there were real grounds for believing that Mr. Wilson had a *prima facie* title to sell the holding which had been disposed of. It had turned out in the result that there was a small portion—3 roods 13 perches—which was not held by Wilson under the fee-farm grant, but was held as a tenancy from year to year from the urban council, and therefore Wilson could not sell that portion under the Act of 1903. That Act contains drastic provisions enabling the Land Commission to vest lands absolutely in fee-simple discharged from all claims. Under s. 16 of the Act of 1903 the Land Commission may, where they agree to purchase any land, make a vesting order vesting the lands absolutely in the purchaser free from all claims, unless within two months cause is shown against

the vesting order being made, "and in such case, unless the cause shown is disallowed, the order shall not be made." Section 17 provides for the publication of advertisements and notices subject to which the vendor may be dealt with for all purposes, other than the distribution of the purchase-money, as the owner of the land. Notices had been received by the Estates Commissioners from the solicitor of the urban council pointing out that the 3 roods 13 perches were held as a tenancy from year to year. That notice was, he presumed, considered by the Estates Commissioners, who replied on May 23 that they were satisfied that the vendor held all the lands under the fee-farm grant, and should be dealt with under s. 17. They had accordingly lodged the purchase-money in bank, and made an order attaching all claims thereto. It was not disputed that a vesting order had the force of a Landed Estates Court conveyance. By s. 32 of the Land Act of 1896, s. 34, of the Local Registration of Title (Ir.) Act (which relates to the correction and verification of the register) is extended to vesting orders. The first part of s. 34, dealing with "actual fraud or mistake," had no application to a case like the present—the order made here was not fraudulently made. Mistake in that section meant common mistake; the purchaser here intended to buy what he got. His Lordship read the second portion of the section, providing that an error may be corrected if in the opinion of the Court it "can be corrected

APPEAL.

Feb., May,
1908.

APPEAL.
—
Feb., May,
1908.

without injury to any person," and proceeded to say that here there was a real intention to vest the land in the purchaser, and a real intention on his part to pay for and acquire it. He did not see how the order could be altered without injuring him. The sub-section seemed directed to cases where a piece of land was conveyed where none of the parties contemplated selling or buying. There was no doubt that the claim of the council was, under the Act of 1903, against the purchase-money. That was the effect of that drastic legislation, which they were bound to follow. They were bound to give effect to it, and to reverse the order of Mr. Justice Ross.

FitzGIBBON, L.J. (dissenting).—They were told that Mr. Justice Ross said that, as between vendor and purchaser, the matter could be settled by arrangement. In that he was right, because between them it was a simple agreement for sale and purchase of land to which the vendor failed to make title as to part. In such a case the purchaser might complete with compensation, or might rescind the agreement, or with the consent of the vendor the agreement might be modified. Before the vesting order was made it was made known to the Commissioners that the plot in dispute was held by Wilson under a different letting from the rest of the holding, and at a distinct rent, and as a tenancy from year to year. It was therefore clear that Wilson was not qualified to sell that portion to a purchasing

tenant. The case of the Commissioners was that the vesting order was valid under s. 17 (1), and that the interest in the land was thereby irremediably converted into money, and that the council should accept money as the only remedy for the sale of the land without their consent. When the circumstances under which the vesting order was made were understood it appeared to him to be impossible to explain or defend the action of the Commissioners other than by negligence or disregard of the information as to the title which was formally made known to them before they made the order; or, by assuming—as he did—that they shared the mistake under which the vendor and purchaser acted, that the 3 roods 13 perches were held under the fee-farm grant of 1686. Such mistakes were inevitable. He had already met several cases of that kind on circuit. In one case the order vested the same plot of bog in each of two tenants. In the present case no irremediable mischief had yet been done to anyone, and all that was necessary now was to confine the sale to the lands contained in the fee-farm grant. Within the fourteen days mentioned in the notice of the Land Commission the solicitor for the Carrickfergus Urban Council gave a detailed statement of their title to the Secretary of the Estates Commissioners, telling him that the lands were held under two titles, and furnishing an extract from a Landed Estates Court rental of 1867, in which the present vendor was put down as tenant from year to year of the 3 roods

APPEAL.
Feb., May,
1906.

APPEAL.
Feb., May,
1908.

13 perches. That letter showed that the vendor had no interest in the plot, and the importance of the case was increased by the fact that the council had been offered over £100 for the plot as a site for buildings. The only answer of the Commissioners to the letter of the council was that the Land Commission were satisfied that the vendor, under the fee-farm grant, was the person who should be dealt with as owner under s. 17. In his opinion the vesting order made in these circumstances was made without jurisdiction. It was his clear opinion that jurisdiction to act under s. 17, by dealing with the vendor as owner for all purposes other than the distribution of the purchase-móney, did not arise until there was *prima facie* evidence that the vendor was a person having power to sell under the Act. The letter of Mr. O'Farrell, Secretary of the Estates Commissioners, did not purport to be an order of the Estates Commissioners, nor did it show that the letter of the council had been considered at all. Assuming that the vesting order was made with jurisdiction, and that registration gave it full force and effect, why was it not to be amended within the powers given by the Local Registration of Title Act for remedying errors? In his opinion amendment was justified by s. 34 of that Act. His Lordship read sub-s. 1, and said that "actual mistake" in the present case was shown by the solicitor for the vendor to have been made. He swore that both parties had acted under the *bona fide* belief that the

whole holding belonged to the vendor. What clearer mutual mistake than that could be proved? The Estates Commissioners said they acted without mistake, though they had a letter before them showing that the holding was held in two different takes. His Lordship next read s. 34 (2), providing for the correction of errors where that could be done "without injury to any person." There could be no injury in any legal sense in preventing the land of the council from being converted into money by a person having no right to so convert it. Reversing Mr. Justice Ross's order and upholding the vesting order must injure either Mr. Wilson or the council, or both, for both must suffer a real injury by the transfer of the claim of the council to the purchase-money. Why? Because that claim was a claim for a valuable interest in land wrongfully converted into money, which interest did not belong to Mr. Wilson, and which was much more valuable than the interest Mr. Wilson agreed to sell for £554. If Mr. Wilson's middle interest were to drop out and Kirk were to become tenant to the council he would be only entitled to have a fair rent fixed, and, under the Act of 1881, the council would have power to resume the plot for building purposes. Therefore, whenever the council came to make a claim against the £554 purchase-money, it must either suffer injury by being given less than it had lost, or Mr. Wilson would have to suffer by having to compensate the council out of the purchase-

APPEAL.

Feb., May,
1908.

APPEAL.
Feb., May,
1908.

money of the entire holding, which was fixed upon so many years' purchase of an agricultural rent of the entire area. The justice of the case was to rectify the mistake the Commissioners had made, leaving the vendor and purchaser to deal with the case in the same way in which it would be dealt with if there were a suit for specific performance of an agreement where the vendor failed to make title. He feared it was impossible to contemplate the consequences of a decision which held such an error as had occurred here to be irremediable.

HOLMES, L.J.—The 3 roods 13 perches were not separated by any physical boundary from the lands granted in 1686, and he had no doubt that both Mr. Wilson and his solicitor believed they were included in that grant. There was no doubt that it was the intention of both landlord and tenant that the purchase-money of £554 was to secure to the tenant the fee-simple of the 3 roods as well as of the rest of the holding. When the originating application was signed there was, he presumed, the usual investigation of title by the Land Commission, and the other steps preliminary to carrying out the agreement taken; but down to the service of the notice of April 25, 1907, nothing was discovered to suggest that all the lands contained in the holding were not granted by the deed of 1686. That notice was in the prescribed form, and in their reply the council stated that the lands were held in two

takes, and that the vendor had no right to sell the 3 roods. The Land Commission proceeded to deal with the vendor as owner for all purposes other than the distribution of the purchase-money, and made the usual order under s. 24 (1) attaching all claims to the purchase-money. It was, he thought, admitted that the effect of the order was to transfer to the purchaser an estate in fee-simple in the 3 roods, even if the vendor had no title thereto, and that if that could be remedied or rectified it could only be done by means of some provision in the Land Purchase Acts under which the vesting order was made. Accordingly the urban council rely, in support of the order appealed from, on s. 32 (3) of the Land Act, 1896, which enacts that s. 34 of the Local Registration of Title (Ir.) Act, 1891, shall extend to a vesting order or fiat as if it was the register, save that the jurisdiction of the Court for the purpose of the Act shall be exercised by the Land Commission. He was of opinion that the effect of the provision in the Local Registration of Title Act was to preserve the jurisdiction of the Courts of equity to amend or set aside any proceeding on the ground of fraud or mistake where an action was brought for that purpose. It was unnecessary for him to express a final opinion upon whether that enactment could be made applicable to the present case, inasmuch as the order appealed from was not made thereunder. The order of Mr. Justice Ross was made under the sub-section of s. 34, which provides

APPEAL.

Feb., May,
1908.

APPEAL
Feb., May,
1908.

that, where "any error occurs in the registration of the ownership of land (whether of misstatement, misdescription, omission, or otherwise, and whether in the register or the map attached thereto), the Court (that is, after the vesting order has been made, the Land Commission or a judge acting therefor), upon such application, and in such manner as may be prescribed, and after such notice, if any, as it may direct, may, if in the opinion of the Court such error can be corrected without injury to any person, order such error to be corrected upon such terms as to costs or otherwise as it may think fit." He was unable to see how the order of Mr. Justice Ross, following the terms of that sub-section, could be supported. How could it be said that the variation of the order was "without injury to any person," when it deprived the purchaser of portion of the premises of which he had been tenant, which he had bought, and for which, notwithstanding variation, he was still liable to pay the purchase-money. But he quite admitted that if the title to the 3 roods was not in the vendor, but in the urban council, the latter had a substantial grievance, and it was natural to ask, was there any remedy for the council having been thus deprived of its property without compensation? Without actually deciding it he was disposed to say that the only remedy in the circumstances of the case was that pointed out in the letter of the Land Commission of May 23. Section 17 of the Act of 1903 enabled the Land

Commission, where a person gave *prima facie* evidence that he was a person having power to sell under the Land Purchase Acts, and satisfied the Land Commission that he had been for not less than six years in receipt of the rent and profits of the land, to deal with him as the owner of the land for all purposes other than the distribution of the purchase-money. Under that section it was for the Land Commission to say whether the *prima facie* evidence of title referred to had been given, and if it so decided that, subject to being satisfied as to the receipt of the rent and profits, it would deal with the person giving such *prima facie* evidence as the owner for all the purposes in the section mentioned. The meaning of the exception of the distribution of the purchase-money from the purposes for which the person giving *bona fide* evidence of title might be dealt with as the owner of the land might be gathered from s. 24 (1), which provided that, so soon as the holding was vested in the purchaser, the Land Commission should pay the purchase-money into the Bank of Ireland, and make an order attaching all claims to the purchase-money. The object of the legislation was to expedite sales by enabling the Land Commission, without exhaustive investigation of title, to vest the holding in the purchaser, by making the purchase-money answerable in exoneration of the land for any claim that could have been maintained against the latter. According to the letter of May 23, that was what the Land Commission purported

APPEAL.
Feb., May,
1908.

APPEAL.
Feb., May,
1908.

to do in that case, and he was disposed to think that in doing so they were acting within their jurisdiction. If so, the proper course for the urban council would be to intervene in the distribution of the purchase-money and to lodge an objection in the usual way. It might be shown that theoretically that would be an inadequate remedy for depriving the council of their property without their consent, but if they were entitled to have full compensation out of the purchase-money for what they had lost the grievance was of a kind with which legislation had made them familiar. In any case he was of opinion that Mr. Justice Ross had misconceived the remedy, and that the order appealed from should be discharged.

Solicitors for the urban district council : *Johns, Bates & Johns.*

Solicitor for the vendor : *L. Jackson Holmes.*

Solicitors for the tenant : *H. Wallace & Co.*

[*Note up on pp. 572 and 827 of Cherry and Wakely's Land Acts, 3rd Edition, 1903; and on pp. 1076 and 1085 of Cherry's Irish Land Act, 1903.*]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before BARTON, J.)

WARNOCK v. JOHNSTON.

Nov. 9, 28, 1907.—*Landlord and tenant—* CHANCERY.
Notice to fix fair rent—Transfer of proceedings— Nov., 1907.
Ejectment for non-payment of rent—Decree—
Estoppel—Representation.

A landlord, the tenant having served a notice in December, 1905, to fix a fair rent in the County Court, obtained an order on March 10, 1906, transferring the proceedings from the County Court to the Land Commission upon the faith of an affidavit, in which it was stated that the transfer proceedings were not brought for the purpose of delay, but for the sole purpose of having the rent fixed by the Land Commission instead of the County Court Judge. It was a term of the order that no proceedings by ejectment or otherwise should be instituted pending the fixing of the fair rent. In Feb., 1906, the landlord had instituted proceedings in ejectment for non-payment of rent, and on March 13, 1906, without the tenant's knowledge, he obtained a decree in ejectment. On May 1, 1906, a caretaker notice was served on the tenant,

CHANCERY. *and when the fair rent application came on before*
Nov., 1907. *the Sub-Commission in Dec., 1906, it was dismissed*
on the ground that the tenancy had been determined.
In an action by the tenant to have it declared that
he was, notwithstanding the decree in ejectment,
a present tenant of the holding, and entitled as
such tenant to have a fair rent fixed :

Held, that the landlord was estopped by the
representations of his agents from setting up the
decree in ejectment as a bar to the fixing of a fair
rent.

This was an action by the plaintiff (1) for a declaration that he was a present tenant to the defendant of a certain holding ; (2) for a declaration that he was entitled as such tenant to have a fair rent fixed upon the said holding ; (3) for an enquiry as to damages (a) suffered by him by reason of the defendant having deprived him of the use and occupation of the said holding, and having put him to legal and other expense in connection with trying to retain possession of the same ; or (b) in the alternative, by reason of the defendant's disobedience of a certain order of the Irish Land Commission Court of March 10, 1906. The facts were as follow :—In Dec., 1905, the plaintiff was tenant to the defendant of a holding containing 9 acres 12 perches at a yearly rent of £5 4s. 6d. On Dec. 7, 1905, the plaintiff's originating notice to fix a fair rent upon the said holding in the County Court was served upon

the defendant's land agent, and upon the Clerk of the Crown and Peace for Co. Leitrim on Dec. 9, 1905. On Dec. 19, 1905, the defendant's solicitor served notice to have the proceedings transferred from the said County Court to the Court of the Irish Land Commission. On Dec. 22, 1905, notice showing cause against such transfer was served by the plaintiff, and on Jan. 5, 1906, a notice of motion in the Court of the Irish Land Commission to disallow the cause shown was served by the defendant for Jan. 11, 1906. This motion was grounded on an affidavit of the landlord's agent filed Jan. 2, 1906. The motion was heard on March 10, 1906, when an order was made by FitzGerald, J., transferring the proceedings from the said County Court to the Court of the Irish Land Commission, and directing, and on the terms, that no proceedings by ejectment or otherwise should be instituted, pending the fixing of the fair rent, without leave of the said Court. On Feb. 15, 1906, a civil bill process in ejectment for non-payment of rent had been served by the defendant on the plaintiff. It was because of the said pending ejectment proceedings that the said order of March 10, 1906, was made. Notwithstanding the said order, the said ejectment proceedings were proceeded with, and on March 13, 1906, in the absence of, and without the knowledge of, the plaintiff a decree in ejectment was made by the County Court Judge. On May 1, 1906, a caretaker notice under the Land Law (Ireland) Act, 1887, s. 7,

CHANCERY.
Nov., 1907.

CHANCERY. was served on the plaintiff. When the application to fix a fair rent came on before the Sub-Commission on Dec. 11, 1906, the said originating notice was dismissed on the ground that the plaintiff's tenancy was determined by the said ejectment proceedings. The said ejectment decree was executed by the Sheriff on Jan. 28, 1907. Notice of appeal to the Land Commission was served by the plaintiff on Jan. 30, 1907. When the said appeal came on for hearing on April 30, 1907, it was adjourned by FitzGerald, J., pending the present action.

Molony, K.C., Horner, K.C., and M'Loone for the plaintiff.

Gaussen for the defendant.

The following authorities were cited in the argument:—Land Law (Ir.) Act, 1881, ss. 13 (3), 37 (4); Land Commission Rules, Jan., 1897, rr. 72–76; Land Law (Ir.) Act, 1887, s. 30 (1); Land Law (Ir.) Act, 1896, s. 16; *Gorman v. La Touche*, [1890] 26 L. R. Ir. 583; *Ballantine v. Earl of Gosford*, VI. Quart. Land Rep. 97; *Barton v. M'Fadden*, [1905] X. Quart. Land Rep. 79; *Shaw v. Earl of Jersey*, [1879] 4 C. P. D. 120, 359; *Burke v. O'Callaghan*, [1865] 17 I. C. L. R. 42; *Wentworth v. Bullen*, [1829] 9 B. & C. 840.

Cur. adv. vult.

Judgment was delivered on Nov. 28, 1907.

BARTON, J.—The plaintiff was, until his tenancy was determined in 1906, a tenant from

year to year to the defendant, and this action is brought, in effect, to have it declared that— CHANCERY.
Nov., 1907.
notwithstanding a certain decree in ejectment for non-payment of rent, the service thereunder of a caretaker's notice, the consequent determination of the tenancy, the expiration of the period of redemption, and the execution of the decree—the plaintiff is, under the particular circumstances of the case, entitled to apply to the Land Commission to have a fair rent fixed upon his holding, and that he is not debarred by those ejectment proceedings from having the fair rent fixed. It is not sought to set aside the decree in ejectment. It could not be set aside except for actual, as distinguished from constructive, fraud: *Patch v. Ward*, [1867] L. R. 3 Ch. 203. Actual fraud is not alleged. But injustice may result to a tenant from some inadvertence or from some misunderstanding between the different persons employed on behalf of the landlord. That is what happened in this case. Accordingly the decree stands, and if the plaintiff is to succeed he must succeed in spite of the decree and the proceedings thereunder. He is bound to show that the defendant is precluded either by contract or estoppel from setting up the ejectment proceedings as a bar to the fixing of a fair rent. [His Lordship then referred to the facts, and went on to say.] The affidavit filed on Jan. 2, 1906, is one of the vital documents in the case. In paragraph 2 thereof the landlord's agent stated on oath—"I say

CHANCERY.
Nov., 1907.

that it is not for the purpose of delay that said notice of motion for a transfer was served by the landlord on the said tenant, but for the sole purpose of having the rent fixed by the Land Commission instead of the County Court Judge ;” and in paragraph 4 he further stated—“ I know the foregoing statements of my own knowledge acting as land agent on the property of said landlord.” This was a representation to the Court and to the tenant, which was intended to be acted upon by them. It was acted upon by the tenant withdrawing his opposition to the transfer and by the Court granting the application to transfer on March 10, 1906, upon the faith of the affidavit. It was not a representation of a mere intention, but of a fact—namely, that the application had not been made for the purpose of delay, but for the sole purpose of having the tenant’s rent fixed by the Land Commission. That was a very material representation, having regard to the practice of the Land Commission with reference to these transfers. The Land Commission has always been on its guard to prevent the landlord using this transfer procedure for the purpose of depriving the tenant of the right which he would otherwise enjoy of having a fair rent fixed : Land Commission Rules, Jan., 1897, r. 72. It was suggested by the defendant that the Land Commission only imposes terms for the purpose of preventing proceedings for rent, or ejectment in respect of rent, which would be affected by the fixing of a

fair rent. But I have the highest authority, having made inquiries from all the learned Judges of the Land Commission Court, past and present, who are still on the Bench, that this is not so. In many cases that may be the only matter requiring attention. But the Court always recognises that, although a tenant may be in arrear of rent, he can, upon the fixing of a fair rent, sell his tenancy, or procure money upon the security of the tenancy to pay his rent, and they always impose terms to prevent the transfer being used for the purpose of delay so as to determine the tenancy. If the landlord refuses to give the usual undertaking the Court leaves the case in the County Court, and no injustice is done. A reference was made in the argument to what was called, in *Gorman v. La Touche*, *vide sup.*, a "fair race" between the two jurisdictions. But that applied to a case where the tenant selected the Land Commission as his tribunal. Besides, the tenant, pending the application for a transfer, is tied up and can do nothing (Rule 77), while the landlord can proceed with the ejectment. The landlord having filed his agent's affidavit on Jan. 2, and served notice of the filing on the plaintiff, the application for transfer was listed upon Jan. 19. The landlord was not represented, and the case was struck out. But I infer that the tenant having then become aware of the contents of the affidavit, and of the solemn assurance of the agent that the application was not brought for the purpose of delay,

CHANCERY.

Nov., 1907.

CHANCERY. took no more interest in the matter and was not
Nov., 1907. represented in any subsequent proceedings. If the motion had been heard on Jan. 19 the landlord could only have obtained a transfer on the terms of an undertaking not to institute proceedings by ejectment pending the fixing of a fair rent. Under these circumstances it is surprising to find that the landlord's solicitor availed himself of this adjournment to serve on Feb. 15 a civil bill ejectment for non-payment of rent. That ejectment enabled the landlord to determine the tenancy by a caretaker's notice served on May 1, with the result that, unless the tenancy should be redeemed or the tenant reinstated, it would become impossible for the tenant to have a fair rent fixed. This ejectment proceeding was plainly inconsistent with, and opposite to, the statements contained in the affidavit of the landlord's agent. I have already said that I am not asked to set aside this decree. The plaintiff rests his case upon contract and upon estoppel. On contract, I think that the plaintiff cannot succeed. If the Land Commission order of March 10 had been in the form of a consent order referring to or otherwise embodying the agent's affidavit it might have been a different matter. A contract embodied in a consent order is not less a contract because there has been superadded to it the command of a judge : *Wentworth v. Bullen*, *vide sup.* ; *Conolan v. Leyland*, [1884] 27 Ch. D. 632. But this was not an order embodying a consent. There

remains estoppel. In my opinion the defendant is estopped by the representations of his agents from setting up these ejectment proceedings as a bar to the fixing of a fair rent. I refer to the representation contained in the agent's affidavit and to the conduct of the defendant and his agents in obtaining the transfer order on the faith of that affidavit, and upon the terms of his undertaking not to institute ejectment proceedings pending the fixing of the fair rent. This ejectment decree has not the effect of a conclusive judgment *in rem*. The defendant may, notwithstanding these ejectment proceedings, reinstate the tenant and give effect to his representation by enabling a fair rent to be fixed: Land Law (Ir.) Act, 1881, s. 20 (2); Land Law (Ir.) Act, 1887, s. 7 (3). It is not the case of a conclusive judgment which cannot be avoided by the act of the parties, or of a judgment the rights under which the landlord has any difficulties in waiving. The English authorities upon equitable estoppel do not, and could not, include a case resembling this one in its circumstances. But I may refer to two cases from which some assistance may be derived: *Wing v. Harvey*, [1854] 5 De G. M. & G. 270, the judgment of Knight Bruce, L.J.; *Mills v. Fox*, [1887] 37 Ch. D. 153, and especially the observations of Stirling, J., at the foot of p. 166 and on p. 167. Similarly, I am of opinion that the defendant is precluded by his representations made to the plaintiff and to the Court, on the faith of which

CHANCERY.

Nov., 1907.

CHANCERY. he obtained the order of transfer, from setting
Nov., 1907 up these ejectment proceedings as a bar to the
fixing of a fair rent, or from alleging, contrary to
those representations, that at the date of that
order proceedings were pending for the purpose
of preventing the fair rent being fixed. He is
bound to make good his representations, and he
has ample power to do so. I see no grounds for
imposing any terms upon the plaintiff as to
payment of rent. His right is to be restored to
the position and status which he enjoyed before
the order of transfer was obtained upon the
representations to which I have referred. No
question as to damages arises, as the decree
proceeds not upon contract but upon estoppel.

Solicitor for the plaintiff: *Louis Lipsett.*

Solicitor for the defendant: *Alfred Stubbs.*

[*Note up on pp. 284, 324, 442, 556, and 734 of
Cherry and Wakely's Land Acts, 3rd Edition,
1903.*]

KING'S BENCH DIVISION.

(Before LORD O'BRIEN, L.C.J., GIBSON and
KENNY, JJ.)

NASH & SON v. NEAZOR.

May 7, 18, 1907.—*Land Purchase—Purchase agreement—Arrears of rent—Promissory note given in respect of arrears.*

KING'S
BENCH.
May, 1907.

A certain estate was being sold to the tenants under the Land Act, 1903, and the plaintiffs, who were the agents for the estate, agreed with one of the tenants who then owed two years' rent that he should purchase his holding for a sum of £951, which included one of the two years' arrears, and that the plaintiffs should pay the landlord the remaining year's arrears, receiving in consideration thereof a promissory note signed by the tenant and by the defendant as surety. The promissory note was made in pursuance of this agreement on Oct. 11, 1905. On the same date, and in pursuance of the said agreement, the usual form of agreement for the purchase of a tenant's holding was signed by the tenant. The agreement was subsequently filed, but the lands had not yet been provisionally declared an estate. The tenant discharged portion of the promissory note, but the balance remained unpaid, whereupon the plaintiffs issued a Civil Bill against the defendant as surety on the note

KING'S
BENCH.
May, 1907.

for such balance. The County Court Judge dismissed the case, and, on appeal, the Judge of Assize stated a case.

Held (KENNY, J., *dissenting*), *that the plaintiffs were throughout the transaction the alter ego of the landlord, and could not succeed, having regard to s. 35 of the Land Law (Ir.) Act, 1896.*

Special case stated by the Lord Chief Justice of Ireland under the Civil Bill Courts Procedure Amendment Act (Ireland), 1864—(1) The plaintiffs in this Civil Bill appeal, by their Civil Bill dated Sept. 11, 1906, sued the defendant for the sum of £10, balance alleged to be due by the defendant to the plaintiffs on foot of a promissory note dated Oct. 11, 1905, and payable one month after date, made by the defendant and by John Downey, of Shannongrove, who is a tenant on the Caulfield estate. The plaintiffs are agents for the said estate. The defendant was merely surety on the promissory note, and took no benefit under it. The note was as follows:—"Limerick, Oct. 11, 1905. One month after date we jointly and severally promise to pay James Nash, or order, at the National Bank, Ltd., here the sum of £30 sterling for value received. (Signed), John Downey, Robert Neazor." The County Court Judge dismissed the said Civil Bill. (2). An appeal by the plaintiffs came before me at the Limerick Spring Assizes, 1907, and on the hearing of the appeal the following facts were proved:—In

the year 1905 the plaintiffs, as agents for the Caulfield estate, were negotiating with several tenants thereon, including the said John Downey, for the sale to them of their holdings under the Irish Land Act, 1903. The said John Downey, on Oct. 11, 1905, owed two years' rent of his holding. On that date it was agreed by the plaintiffs, acting as such agents, and the said John Downey that the latter should purchase his holding under the said Act for the sum of £951, which included one of the two years' arrears, and that the plaintiffs should pay the landlord of the Caulfield estate the remaining year's arrears, receiving in consideration thereof a promissory note signed by the said John Downey, and by a surety to be approved of by the plaintiffs. The promissory note on foot of which this action is brought was made, in pursuance of this agreement, on Oct. 11, 1905. (3) On the same date, and in pursuance of the said agreement, the usual form of agreement for the purchase of a tenant's holding under the Irish Land Act, 1903, was signed by (amongst others) the said John Downey, as tenant. The said agreement, duly executed by all the necessary parties, was lodged in the office of the Estates Commissioners on Feb. 17, 1906. The lands have not yet been provisionally declared an estate by them. (4) The plaintiffs discounted the said promissory note on Oct. 24, 1905. The said John Downey paid the plaintiffs a sum of £20 on foot of the said promissory note

KING'S
BENCH.

May, 1907.

KING'S
BENCH

May, 1907.

on Oct. 27, 1905, leaving still unsettled the balance sued for in the Civil Bill. (5) Counsel for defendant argued before me that the balance sued for could not now be recovered, having regard to the provisions of the Purchase of Land (Ireland) Acts, and more particularly to s. 35 of the Land Law (Ireland) Act, 1896. Relying on the case of *O'Shea v. Walshe*, 29 Ir. L. T. R. 95, counsel for the plaintiff argued contra. (6) The question for the decision of the Court is whether the plaintiffs are precluded from recovering the said balance of £10 on foot of the said promissory note by reason of the provisions of the Purchase of Lands (Ireland) Acts. If the said question is decided in the plaintiffs' favour they are to have a decree for £10, with the costs in the Court below and the costs of the appeal, and if in the defendant's favour the dismissal is to be affirmed with costs. In no event, by consent of the parties, are the plaintiffs to get the costs of the case stated.

W. Q. Murphy, for the plaintiff, cited *O'Shea v. Walshe*, 29 Ir. L. T. R. 95.

Patrick Kelly appeared for the defendant

KENNY, J.—This case turns chiefly on s. 35 of the Land Law Ireland Act, 1896. [Reads section.] The landlord, who consented to sell, might make any agreement he liked as to the payment of any arrears, but if he fails to do so, and the sale is carried out, the arrears are extinguished. Pending the sale no action for

arrears can be brought. If the sale goes off, the parties are remitted to their old rights, and the arrears remain and can be recovered as a debt. The arrears are not extinguished in all events. If the amount sued for in the present case cannot be regarded as a claim for rent the plaintiffs are entitled to recover. The landlord had a right to keep alive his right to the payment of these arrears if he could do so legally. If it is sought to keep them alive by a device, the only question is whether what is called a device is a legal and effective expedient for its purpose. The transaction here appears to be legal. The tenant was unable to produce cash for the year's rent. The landlord, unless by his agent, does not appear in the case. Am I to infer that this is all a juggle with the landlord's money, and that the landlord is the real plaintiff? I cannot identify the landlord with his agent, and, therefore, I hold that the transaction was an ordinary one of a loan by a third party to pay the landlord's rent, and the rent has actually been paid by the plaintiff. But even assuming that the landlord and the agent are one, and that the agent did not occupy any independent position in the transaction, *prima facie* the right to the rent is not extinguished by the note (*Davis v. Glyde*, 2 A. & E. 623), inasmuch as rent is a higher class of debt. In every case the question is whether the note was accepted in lieu and satisfaction of the rent. The action is barred only if the thing sought

KING'S
BENCH.

May, 1907.

KING'S
BENCH.
May, 1907.

to be recovered is rent. Why is the landlord not entitled, under the circumstances, to recover the amount due on the note given by a third party though to secure payment of rent? The landlord's right against a third party to recover is not affected unless the rent is sued for or unless there is no consideration for the note. [Referred to *O'Shea v. Walshe*; *Davis v. Glyde*, 2 A. & E. 623; *Davidson v. Allen*, 20 L. R. Ir. 16.] I fail to see why a third party should not be liable. There was ample consideration so far as the defendant was concerned. The rent is not extinguished by the section. There is the possibility that it may not be extinguished at all though the right to recover it is suspended.

GIBSON, J.—If the landlord had taken the note in his own name he could not have sued on such note until the purchase fell through. This Court cannot draw inferences of fact. It can only decide on a pure question of law. I think the question here means, on the facts stated, Must the plaintiff be entitled to a decree? *Beully v. Ashley*, 2 H. of L. 534; *Payne v. Rex*, [1902] A. C. 552. Do the facts stated exclude an intention to evade the Act? *Guardians of Middleton Union v. M'Donnell*, 29 Ir. L. T. R. 131. In my opinion the plaintiffs were the *alter ego* of the landlord. The arrears were in existence and unsatisfied when the note was made. The note did not extinguish the rent: *Davidson v. Allen*, 20 L. R. Ir. 16. It is

doubtful whether it even postponed it. The case does not state that the note was accepted in lieu of rent. I do not think that the facts stated show that as a matter of law the plaintiffs are entitled to recover. Judge Adams held that the transaction was a contrivance. The inference drawn by him was a competent one to draw, and the facts found in the case would not, if the case had been tried by a jury, entitle the plaintiff to have a verdict directed for him.

KING'S
BENCH.
May, 1907.

LORD O'BRIEN, L.C.J.—I agree with Gibson, J. The County Court Judge plainly held that what had occurred was intended to be as, in my opinion, it plainly was, a contrivance to evade and violate the scope and object of the Act of Parliament. I do not say that there was any moral culpability or that the contrivance was dishonest, but what was done was a method of evading an Act of Parliament, and was so intended. All that took place was part and parcel of the same transaction in which the agent acted beyond all doubt as the *alter ego* of the landlord. The transaction was *ex facie* meant to defeat the scope and object of the Act, and, indeed, to hold otherwise would be to sanction evasions and nullify a provision of the Act.

Solicitor for the plaintiff : *Ralph Nash.*

Solicitor for the defendant : *P. E. O'Donnell.*

[*Note up on pp. 89 and 576 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of SIR WILLIAM
STAWELL.

LAND
COMMISSION.
Nov., 1907.

Nov. 12, 1907.—*Land Purchase Acts—Irish Land Act, 1903—Sections 12 and 43—Reserve fund—Power to make advances out of—Holding sold under prior Land Purchase Acts.*

The Estates Commissioners have no jurisdiction to make grants out of the Reserve Fund for the benefit or improvement of holdings which have not been sold under the provisions of the Act of 1903.

Accordingly, where an evicted tenant (whose holding formed part of an estate for sale in the Land Judge's Court), having been reinstated in his holding by the Land Judge as tenant from year to year, pending the matter, made an offer to purchase his said holding, which was accepted by the Land Judge, and applied to the Land Commission for an advance, which was sanctioned, and where the Estates Commissioners were of opinion that a free grant for repairing the house on the holding and providing the tenant with stock was necessary and expedient in order to enable him to work the holding with advantage :

Held, that the proposed free grant could not be made.

Question of law submitted by the Estates Commissioners arising upon the following facts :— Patrick Flynn was originally a tenant on the estate of Sir William F. Stawell, but had been evicted for non-payment of rent in 1893. The estate was for sale in the Land Judge's Court. There had not been a request under s. 40 of the Act of 1896. On July 1, 1905, the said Patrick Flynn was reinstated in his holding as tenant from year to year pending the matter under a court agreement. The said tenant, having offered to purchase his said holding from the Land Judge for the sum of £300, the Land Judge accepted the offer and the Land Commission sanctioned an advance of the said sum of £300 to enable him to complete the purchase. The tenant's application for the advance was in Form 34 of the forms prescribed by the rules of March, 1897. The said holding was not yet vested in the said Patrick Flynn. The Estates Commissioners were of opinion that a fee-farm grant of £150 should be made from the reserve fund for the purpose of repairing the house on the holding and of providing the said Patrick Flynn with stock to enable him to work the said holding to advantage. They were also of opinion that the proposed expenditure was expedient for the purposes of the Irish Land Act, 1903, one of those purposes being the provision of farms for evicted tenants, and, as incidental thereto, the provision, where necessary, of

LAND
COMMISSION.
Nov., 1907.

LAND
COMMISSION.
Nov., 1907.

funds to enable them to work such farms in such manner as will enable them to pay the annuities on the purchase-money advanced. The following question was submitted:—Are the Estates Commissioners, under the circumstances aforesaid, entitled under s. 12 of the Act of 1903 to expend the said sum of £150 in the way hereinbefore mentioned as being a step necessary for the purposes of the Act of 1903, notwithstanding that the said holding does not form portion of an estate purchased, or proposed to be purchased, under the said Act?

Dudley White for the Treasury.

John Linehan for Patrick Flynn.

WYLIE, J.—The question really is whether, under s. 12 of the Act of 1903, an advance can be made out of the reserve fund mentioned in s. 43 under such circumstances as exist in the present case, where the Land Commission have not certified, and could not certify, that such an advance is necessary for the benefit and improvement of an estate. In the present case Patrick Flynn, to whom it is proposed to make a free grant, purchased his holding from the Land Judge. The advance to enable him to do so was sanctioned by Mr. Commissioner Lynch, sitting as a Land Commissioner under the old Land Purchase Acts. Now, as the powers of the Estates Commissioners are confined to dealings under the Act of 1903,

and by s. 43 the reserve fund is only made applicable to land purchased under that Act, ^{LAND} COMMISSION.
I must hold that they have no power to expend Nov., 1907.
the sum in question.

Solicitor for the Treasury : *W. G. Towers.*

Solicitor for the tenant : *William Murphy.*

[*Note up on pp. 1068 and 1099 of Cherry's Irish
Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of GEORGE HEWSON
and JAMES E. PENROSE.

LAND
COMMISSION.
—
Feb., 1908.

Feb. 5, 1908.—*Land Purchase Acts—Declaration of estate—Exclusion of portion of lands included in originating application—Irish Land Act, 1903.*

The Estates Commissioners have no power, without the consent of the vendor, to exclude part of the lands comprised in an originating application lodged with them pursuant to the provisions of the Irish Land Act, 1903, and to declare the residue as fit to be regarded as an estate for the purposes of the Act and proceed to conclude the sale thereof to the tenants.

Question of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner. The following facts appeared from the memorandum. The case was one of a sale direct to the tenants. By an agreement dated May 15, 1904, and lodged with the Land Commission on July 28, 1904, the vendors agreed to sell to James Kenny his holding, containing 120a. 1r. 39p., for the sum of £2,134,

and the said James Kenny applied to the Land Commission for an advance of the said sum to enable him to complete his purchase, and agreed to pay interest on the purchase-money at three and a half per cent. from the date of the agreement up to the date of the advance. The said holding was at the date of the said agreement subject to a judicial rent fixed by agreement, and the purchase annuity which would have become payable if the advance had been made would be within the "zones." In March, 1905, the Estates Commissioners directed that, subject to the result of such further inquiries as might be made, the lands for sale in this matter might be regarded as an "estate." The said James Kenny failed to pay the interest in lieu of rent payable under the said agreement which became due on May 1, 1906, and the Land Commission having obtained judgment for £37 6s. 11d., the amount of such half-yearly interest, that amount, together with a sum for costs, was realised through the sheriff and paid to the Land Commission. The said James Kenny had also failed to pay the interest in lieu of rent due on Nov. 1, 1906, and May 1, 1907. As the result of inquiries the Estates Commissioners had formed the opinion that the said James Kenny was wholly unable to pay the interest on the said purchase-money, and that he would be unable to pay the annuity which would be payable in respect of the said advance if it was made. In these circumstances the Estates Commissioners

LAND
COMMISSION.
Feb., 1908.

LAND
COMMISSION.
Feb., 1908.

were not prepared to declare the property, including the holding of the said James Kenny, as fit to be regarded as an "estate" for the purposes of the Act of 1903, but were prepared to declare the rest of the property, exclusive of the holding of the said James Kenny, fit to be regarded as an "estate" for the purposes of the Act, and to proceed with the sale of such estate in due course. The vendors, however, did not consent that this should be done. The following question of law was submitted:—
In the above circumstances have the Estates Commissioners power, without the consent of the vendors, to declare that the property included in the originating application, exclusive of the holding of the said James Kenny, is fit to be regarded as an estate for the purpose of the Irish Land Act, 1903, and to proceed to conclude the sales to the tenants other than the said James Kenny?

Hynes for the vendors.

Dudley White for the Treasury.

WYLIE, J.—I will answer the question put to me, "No." I decide it quite independently of the fact that the price agreed upon for the purchase of Kenny's holding is within the zones. All I decide is that the Estates Commissioners have no power against the will and without the consent of the vendors to declare part of the lands comprised in the originating application

to be an "estate." If the vendors consented to strike out part it would be a different thing.

LAND
COMMISSION.

Feb., 1908.

Solicitors for the vendors: *Moore, Keily & Lloyd.*

Solicitor for the Treasury: *W. G. Towers.*

[*Note up on p. 1052 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of EDITH MILLICENT
PAYNE GALLWEY.

LAND
COMMISSION.
Jan., 1908.

Jan. 21, 1908.—*Land Purchase Acts—Practice—
Superior rent—Redemption—Receiver's fees.*

Where an estate, sold under the Irish Land Act, 1903, was held under an indenture of fee-farm grant which provided for an additional payment of 6d. in the £ as receiver's salary, over and above the rent thereby reserved, but no such payment had ever been made or demanded since the date of the grant. On an application to redeem the interest of the grantor :

Held, that the rent should be redeemed without taking into account the grantee's covenant to make such additional payment as aforesaid.

Application for an order to redeem and fix the redemption price of a yearly fee-farm rent of £142 19s., adjusted to £142 15s. 4d., payable and reserved out of the lands for sale in this matter and other lands by indenture of fee-farm grant dated July 26, 1851, made between Edward Worth Newenham of the one part and Sir William Payne Gallwey, Bart., of the other part. It appeared from the affidavit of the agent over the

estate that there were twelve tenants on the estate, at a gross rental of £294 8s., all of them being either first term, judicial, or yearly tenants, and entitled to have their rents readjusted. The poor law valuation was £363 10s. and the area 577a. 1r. 28p. statute measure. The purchase-money amounted to £5,987. The only other security for the charges which had to be redeemed was a head rent of £24 19s. The charges to be redeemed out of the said purchase-money were the said adjusted rent of £142 15s. 4d., a quit rent of £1 19s. 2d., and a tithe rent-charge of £40 9s. 9d. determinable in eleven and a half years. The vendor was willing to redeem all the charges out of the present sale. In addition to the said fee-farm rent the said indenture of fee-farm grant provided for the payment of a sum of 6d. in the £, and in case of distraining then 12d. in the £ as receiver's salary, but no payment had ever been made or demanded in respect thereof.

LAND
COMMISSION.
Jan., 1908.

Russell for the vendor.

Norwood for the owners of the fee-farm rent.—
The question is whether the 6d. in the £ for receiver's fees should be redeemed. Under the deed it is recoverable by distress in the same manner as rent. "Receiver's fees" reserved in addition to "rent" form part of the rent reserved: *Pakenham v. Williamson*, 30 L. R. Ir. 292. The consent provides for redemption of all reservations in the fee-farm grant.

LAND
COMMISSION.

Jan., 1908.

WYLIE, J.—As regards the receiver's fees, it is admitted that they were never paid since the date of the grant in 1851. In these circumstances I would, if necessary, presume a deed of release. I will redeem the rent of £142 15s. 4d. at the sum of £3,710.

Solicitor for the vendor : *E. D. Hunt.*

Solicitors for the owners of the fee-farm rent :
William Guest Lane & Co.

[*Note up on p. 391 of Cherry and Wakely's Land Acts, 3rd Edition, 1903, and on p. 1131 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of EMELIA JULIA
AYLMER GOWING.

Jan. 21-23, 1908.—*Land Purchase Acts—*
Enforceability of agreements after death of vendor—
Discretion of Estates Commissioners as to sanc-
tioning advances.

LAND
COMMISSION.
Jan., 1908.

After the lodgment with the Land Commission of an agreement for the sale of a holding and an originating application, but before any advance had been sanctioned, the vendor died, and her executors obtained a conditional order to carry on the proceedings. By her will, executed some years prior to the purchase agreement, the lands had been bequeathed specifically to H. A. K., who now applied to the Estates Commissioners to refuse the advance on the ground that the completion of the original contract would prevent the specific bequest from taking effect, and undertook, in the event of their doing so, to enter into a similar agreement so that the tenant should not be prejudiced :

Held, that the Estates Commissioners, in exer-

LAND
COMMISSION.

Jan., 1908.

cising their discretion as to whether they would or would not make the advance, were not entitled to take such matters into consideration.

Questions of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner. Certain lands of Skerrymount, County Meath, held by the vendor under lease dated April 2, 1783, for a term of 999 years, at a yearly rent of 5s., were in the possession of Bridget Everard, as a yearly tenant (non-judicial), at the annual rent of £40, and the vendor in 1905 had agreed to sell the holding to the tenant under the provisions of the Irish Land Act, 1903, and lodged the agreement and originating application with the Land Commission. The vendor, by her will, executed prior to the agreement for sale, had specifically bequeathed the said lands. The vendor died before any step had been taken by the Land Commission, save the collection of interest in lieu of rent, and the executors of her will obtained a conditional order directing that the proceedings should be carried on in their names as such executors. The further facts and the questions arising thereon are stated in the judgment.

Law Smith, K.C., for the executors of the vendor.

Meredith, K.C., for Rev. Henry Alexander Kennedy, referred to *Sherlock's Estate*, [1899] 2 Ir. R. 506-601.

WYLIE, J.—On Feb. 1, 1905, the vendor and her tenant, Bridget Everard, executed an agreement for the sale of her holding on the vendor's estate, for the sum of £890, under the Act of 1903. The agreement was in the authorised Form "F," and contained in clear terms all the essential elements of a valid contract for sale, the only condition attached to it being that an estate, of which the holding formed part, should be sold under the Act of 1903. The agreement contained an application by the tenant to the Land Commission for an advance of the sum of £890, for the purpose of such purchase, repayable as provided by the Act. On March 13, 1905, the vendor lodged with the Land Commission an originating application in the prescribed form, together with the said agreement. By said originating application the vendor applied that the lands specified in the schedule thereto (of which the above holding formed a part) might be declared fit to be regarded as a separate estate for the purposes of such sale, and thereupon, pursuant to the provisions of the Act, the Land Commission proceeded to collect the interest in lieu of rent, payable under the terms of the agreement, pending the completion of the sale, and lodged one gale of the interest to the vendor's account on July 20, 1905. The vendor died on Aug. 20, 1905, having previously, by her will dated March 27, 1899, bequeathed the lands comprised in the above holding to the Rev. Henry Alex. Kennedy, whom, together with two

LAND
COMMISSION.
—
Jan., 1908.

LAND
COMMISSION.
Jan., 1908.

others, she appointed executors and trustees of her will, and gave her residuary personal estate to other persons, and the executors obtained probate in Nov., 1905. The executors applied to the Estates Commissioners for an order to carry on the proceedings in their names, and the Rev. Henry Alex. Kennedy and the trustees of his marriage settlement, who claim under an after-acquired property clause, oppose the order, and have raised the first and second questions submitted to me by the Estates Commissioners. The first question is, whether the said agreement was specifically enforceable against the vendor at the date of her death? As I have already decided this question in several similar cases it was not really argued, and I answer it, as in the other cases, in the affirmative. The second question, as now amended, is—Assuming said agreement was enforceable, are the Estates Commissioners entitled, in exercising their discretion as to making or refusing the advance applied for, to take into consideration the effect their making the advance under the agreement may have on the interest of the specific legatee under the vendor's will, the specific legatee undertaking, in case the advance under the said agreement be refused, to adopt the said agreement or enter into a new agreement to the same effect, so that the tenant should not be prejudiced? Well, that seems to me one of the most startling propositions I ever heard. In other words, having made

LAND
COMMISSIONER.
Jan., 1906.

up their minds that, as between vendor and tenant-purchaser, this is a proper case in which to declare the estate and make the advance, can they, in their discretion, refuse to make it, in order to give the proceeds to A. B. instead of C. D., as between whom, so far as the Estates Commissioners are concerned, no question of better equity can arise? No doubt the vendor, in 1899, intended to leave this holding to the Rev. Henry Alex. Kennedy after her death, but it is equally clear that in 1905 she intended to turn it into cash and receive the proceeds, in which event the specific legatee could not take it under the prior will. Are the Estates Commissioners entitled to assume that the vendor did not know the effect of a sale on the specific legacy, or, if she did, that she intended to make another will leaving Mr. Kennedy the proceeds of sale, and then take it upon themselves to dispose of the property in the way they think the vendor would have disposed of it if she had lived. In my opinion they are not entitled, in exercising their discretion under the Act, to take any such matters into consideration, and I therefore answer the question in the negative. The third question (*whether the personal representatives are the proper parties to complete the sale?*) I answer in the affirmative. The vendor's estate was a leasehold for years, and therefore the executors are the proper parties to continue the sale and to receive the interest and the

LAND
COMMISSION.

Jan., 1908.

purchase-money, but I decide nothing as to who is beneficially entitled to the interest or proceeds.

Solicitors for the executors : *Wm. Findlater & Co.*

Solicitor for the Rev. Henry Alex. Kennedy :
John Kilkelly.

[*Note up on p. 381 of Cherry and Wakely's Land Acts, 3rd Edition, 1903, and on p. 1136 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of CAPTAIN RICHARD
WILLIAM BLACKWOOD KER.

March 13, 16, 1908.—*Land Purchase Acts—* LAND
Sale direct to tenants—Landlord—Meaning of in COMMISSION.
Land Purchase Code—Tenant-for-life—Assignor March, 1908.
of life estate—Competent vendor—Bonus—Settled
Land Act, 1882, s. 50—Land Law (Ir.) Act,
1881, s. 57—Land Law (Ir.) Act, 1887, ss. 14,
34—Irish Land Act, 1903, s. 17.

The tenant-for-life of an estate, who had assigned his life estate, sold direct to the tenants under the Irish Land Act, 1903. On a question arising as to whether such a vendor, who did not come within the definition of landlord in s. 57 of the Act of 1881, could, in the case of a sale direct to the tenants, be a competent vendor, and as such entitled to the bonus :

Held, that any person having power to sell under the Land Purchase Acts can sell either direct to the tenants or to the Land Commission, and, accordingly, that the vendor was entitled to the bonus.

LAND
COMMISSION.

March, 1908.

Question arising on allocation. The material facts appear from the judgment.

R. F. Harrison, K.C., for the assignees and trustees of the life estate.—There are two classes of sales contemplated by the Land Purchase Acts—sales to the tenants direct and sales to the Land Commission. In sales direct to the tenants the vendor must be a “landlord,” as defined in the Landlord and Tenant (Ir.) Act, 1881, s. 57. Unless the vendor comes within the definition, the provisions of the Settled Land Acts do not apply. The Act of 1870 is the foundation of every sale to a tenant direct. There must be a landlord, a tenant and a holding. The word “vendor” occurs for the first time in s. 5 of the Purchase of Land (Ir.) Act, 1885, but it is there used solely in relation to sales to the Land Commission, and the jurisdiction of the Land Commission to appoint trustees for the purposes of the Settled Land Acts, conferred by s. 13 of that Act, is confined to a similar class of sales. This jurisdiction is extended by s. 23 of the Act of 1887 to all cases where it becomes necessary to appoint trustees for the purpose of any sale under the Land Law (Ir.) Acts, and by s. 34 of the same Act the definition of landlord is extended to include a trustee for sale and a landlord owner as defined by s. 33 of the Act of 1870. By s. 42 of the Act of 1896 a mortgagee in possession is deemed to be a landlord for the purposes of the

Land Purchase Acts, but a mortgagee not in possession, not being a landlord within the meaning of the Acts, has no power to sell LAND
COMMISSION. March, 1908.
(*Redington's Estate*, 23 L. R. Ir., at p. 504), showing that the difference is recognised between those who can sell to the Land Commission and those who can sell to the tenants direct. The term "limited owner" does not occur in the land purchase sections of the Act of 1896. Limited owner in s. 17 (2) of the Act of 1903 must mean limited owner as defined by the Act of 1870, and "landlord" within the meaning of limited owner, as defined by s. 33 of that Act, does not include a tenant-for-life who has assigned his life estate. Accordingly, the tenant-for-life is not entitled to the bonus.

Matheson, K.C., for the vendor, Captain Ker.

Herbert Wilson, K.C., for the other vendors.

Whitaker, K.C., for a mortgagee of the bonus.

WYLIE, J.—In this case Captain Ker, as tenant-for-life of the settled lands under a compound settlement, entered into agreements for sales of a portion of the estate direct to the tenants, and lodged an originating application to have said sale carried out. Long prior to the making of the said agreements Captain Ker had assigned his life interest to William M. Rose and Robert Lord Monkswell, under which assignment the vendor's wife is entitled to an equitable life

LAND
COMMISSION.

March, 1908.

interest. I am not informed whether that assignment was made as part of or by way of any family arrangement or for value, but in either case, under s. 50 of the Settled Land Act, 1882, such an assignment did not in any way affect the power of Captain Ker to sell, though, if it were an assignment for value, he could not exercise his power without the consent of the assignee. Where the assignment is part of a family arrangement the consent of the assignee is by s. 4 of the Act of 1890 rendered no longer necessary. But even where the consent of the assignee is necessary it does not make the assignee in any sense a vendor. No power of sale passes to the assignee, and I have already decided in *Roberts' Estate*, XII. Quart. Land Rep. 249, that the adding of the assignee as a vendor in such a case, by direction of the Examiner, does not affect the right of the real vendor to the bonus. But an entirely novel point has now been raised on behalf of the trustees. It is admitted that if the sale by Captain Ker had been made under s. 6 of the Act of 1903 to the Land Commission instead of being made direct to the tenants Captain Ker would have had full power to sell, and would have been entitled to the bonus, but it is contended that neither Captain Ker nor any other vendor can sell direct to the tenants under the Land Purchase Acts unless he is a "landlord" within the definition in the Act of 1881, and according to that definition he must be entitled

to receive the rents and profits or take possession of the land held by his tenant, that as Captain Ker had assigned his entire interest he was not a "landlord" and could not sell direct to the tenants under the Act of 1903, and if not a competent vendor he would not be entitled to the bonus. Now, I think it may be admitted that prior to the Act of 1887 no one but a "landlord" according to the above definition could sell direct to the tenants under the Land Purchase Acts. But s. 14 of the Act of 1887 provides that where an agreement has been made between a landlord and a tenant for the sale of a holding, and the Land Commission are satisfied that the landlord and tenant are *prima facie* entitled to carry such agreements into effect, the Land Commission may carry the sale through, and s. 34 of that Act provides that "landlord," for the purposes of sales to tenants under the Land Acts, shall include a trustee for sale, and any limited owner as defined by the Act of 1870. This could only mean a limited owner not entitled to receive the rents and profits, otherwise he would have been a "landlord" without this extending clause. The subsequent Acts, I think, make it plain that any person having a power to sell the estate can sell under the Land Purchase Acts either to the tenants or to the Land Commission, and s. 17 of the Act of 1903 makes no distinction between the two classes of sales as to the persons who may be dealt with as the owners of the estate.

LAND
COMMISSION.
March, 1908.

LAND
COMMISSION.

In my opinion Captain Ker is in this case a proper vendor, and the only vendor, and therefore March, 1908, entitled to the bonus.

Solicitors for Captain Ker and other vendors :
H. Wallace & Co.

Solicitors for mortgagee of bonus : *H. Wallace & Co.*

Solicitor for trustees for assignee of tenant-for-life : *Geo. T. Harley.*

[*Note up on pp. 348, 368, 418, and 445 of Cherry and Wakely's Land Acts, 3rd Edition, 1903, and on p. 1077 of Cherry's Irish Land Act, 1903.*]

IRISH LAND REPORTS.

HOUSE OF LORDS.

Before THE LORD CHANCELLOR (LORD LOREBURN), LORDS ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, ATKINSON, AND COLLINS.

EVELYN VISCOUNTESS DE VESCI *v.* O'CONNELL.

March 24, 26; May 22, 1908.—*Landlord and tenant—Land Purchase Acts—Appeal to House of Lords from decision of Land Judge—Competency—Superior interest—Head rent—Apportionment—Redemption of liability for rent out of estate indemnified therefrom—Right over against indemnifying lands—44 & 45 Vict., c. 49, s. 48 (2)—Land Law (Ir.) Act, 1896 (59 & 60 Vict., c. 47), ss. 31 (4), 33 (4)—3 Edw. VII., c. 37, s. 24 (13).*

HOUSE OF LORDS.
March, May, 1908.

An appeal lies to the House of Lords from an order of the Court of Appeal on appeal from a decision of the Land Judge exercising the extended powers under s. 31 (4) of the Land Law (Ir.) Act, 1896.

Section 33 (4) of the Land Law (Ir.) Act, 1896, declaring the person entitled to the purchase-money

HOUSE OF LORDS.
 March, May, 1908.

of apportioned and redeemed rent, in respect of which a right of indemnity exists, to be entitled to the proportion of the redeemed "rent as if he had purchased the same," must be construed with reference to the former practice and to the fact that the landlord is not within the contemplation of the section at all. Therefore, in the case of a sale of lands subject with other lands to an apportioned fee-farm rent, and entitled to be indemnified as to the remainder of such rent by other lands vested in the same head landlord, the redeemed rent will be charged on the indemnifying lands puisne to the unredeemed rent and not in equal priority therewith, the head landlord remaining unaffected by the equities between the tenants.

Appeal from an order of the Court of Appeal dated April 23, 1907, in the matter of the *Estate of E. W. Thomson, Owner; C. O'Connell, Administrator of Catherine Richardson, Petitioner*, reversing an order of Ross, J., dated Jan. 23, 1907, declaring the annual sum of £16 7s. 5d., being the amount of an apportioned part of a fee-farm rent of £404 5s. 2d., payable out of the lands sold in this matter, and redeemed out of the purchase-money, to be puisne to the unredeemed portion of the said head rent.

The facts as stated by Ross, J., in his judgment were as follow :—

By an Incumbered Estates Court Conveyance dated Nov. 4, 1854, certain townlands of Clontygora North and Clontygora South and Eden-

tubber were conveyed subject, in conjunction with other lands, to an entire fee-farm rent of £404 5s. 2d. reserved by an indenture of fee-farm grant dated April 15, 1852 (made in lieu of a lease for lives renewable for ever), with such rights of indemnity in respect of an annual sum of £17 late currency, equivalent to £15 13s. 10d. present currency, part thereof, against part of the lands comprised in the grant known as Hall's part of Monascribe as were given by an Indenture dated July 29, 1818, but liable to bear the residue of the said rent in indemnification of all other lands liable thereto. The lands of Killeen, which have been sold in this matter, are portion of the other lands liable to the said rent, and they were by another Incumbered Estates Court Conveyance dated May 9, 1855, conveyed subject to the said rent of £404 5s. 2d. [to Henry Thomson, his heirs and assigns], and with the like right of indemnity in respect of the said annual sum of £17, late currency, equivalent to £15 13s. 10d., present currency, and also indemnified against the residue of the said rent by the said lands of Clontygora North and Clontygora South and Edentubber. By an order dated March 7, 1906, £16 7s. 5d., part of the said rent of £404 5s. 2d., was apportioned on the said lands of Killeen, and the residue of the rent on the residue of the lands comprised in the fee-farm grant; and by an order dated June 14, 1906, the said yearly sum of £16 7s. 5d. was ordered to be redeemed out of the purchase-money of Killeen, at a sum

HOUSE OF
LORDS.

March, May,
1908.

HOUSE OF LORDS. equivalent to twenty-seven and a half years' purchase thereof.

March, May, 1908. The petitioner in the matter, the respondent on the present appeal, was entitled as administrator to part of the money secured by a mortgage granted by Edward Walkington Thomson, the owner of part of the lands of Killeen.

D. F. Browne, K.C., and Pigot took a preliminary objection to the competency of the appeal: there is not power to hear an appeal from the decision of the Court of Appeal reversing the judgment of the Land Judge. In *Reg. (Gosford) v. Irish Land Commission* (33 Ir. L. T. R. 157, [1899] A. C. 435), an appeal to the House of Lords from an interlocutory order in a fair rent case was held incompetent under s. 86 of 40 & 41 Vict., c. 57. [LORD ATKINSON.—Do you say that notwithstanding the wide terms in which the power of appeal is given no appeal lies from the order of the Court of Appeal itself?] I go as far as that. In such a case as this, where *Ross, J.*, was exercising the jurisdiction of the Land Commission, it was not intended in framing the Land Code of Ireland that there should be an appeal to the House of Lords. The decision of the Court of Appeal on appeal from the decision of the Judicial Commissioner on any question other than a question of law under the extended jurisdiction is to be final: 3 Edw. VII., c. 37, s. 24 (13). That includes the

vesting of land in the tenants and distribution of the purchase-money, and s. 23 (1) gives power to refer questions of law to the Judicial Commissioner. Except as provided by s. 24 (12) no appeal shall lie from any decision of the Land Commission. It will be suggested that this is a question of law not under this section, but under s. 33 of the Land Law (Ir.) Act, 1896 (59 & 60 Vict., c. 47). When an extended jurisdiction is conferred under the Land Purchase Acts an extended power of appeal, if intended to be conferred, is given with it. The decision of the Court of Appeal upon appeals permitted from the decision of the Land Commission is "final and conclusive": 44 & 45 Vict., c. 49, s. 48 (2). That was the basis and substratum of the whole of the Land Code, and it was intended that there should be no appeal from the decision of the Court of Appeal. No appeal lies to this House from any question which is not one of law under s. 24 (13) of the Irish Land Act, 1903. The effect of s. 40 (1) (e) of the Land Law (Ir.) Act, 1896, was that although extended powers were conferred on the Land Judge the decision of the Court of Appeal was final.

House of
Lords.

March, May,
1903.

Ronan, K.C., and *H. Wilson*, K.C. (*R. H. Macrory* with them), for the appellants.—The Appellate Jurisdiction Act, 1876 (39 & 40 Vict., c. 59), s. 3, conferred a right of appeal to the House of Lords from the judgments of any Court in Ireland

HOUSE OF LORDS,
March, May, 1908.

from which error or appeal lay immediately before the commencement of that Act, and s. 12 indirectly authorised the House of Lords to allow appeals from Irish Courts where hitherto no appeal has lain. That preserved the existing right of appeal. Where there was an appeal from the decisions of the Court of Appeal and Exchequer Chamber to the House of Lords, s. 86 of the Judicature Act, 1877, gave a similar right. But that did not extend to an interlocutory order on *certiorari* from the common law side: *Reg. (Gosford) v. Irish Land Commission (ubi. sup.)*. Under the Chancery Appeal Court (Ir.) Act, 1856 (19 & 20 Vict., c. 92, ss. 10, 14), there was an absolute appeal to the House of Lords from every order of the Court of Appeal whether on appeals in Chancery or from the Incumbered Estates Commissioners. A new jurisdiction was created by the appointment of the Land Commission, and the Judicial Commissioner became an additional judge of the Supreme Court: 44 & 45 Vict., c. 49, s. 41. Therefore, at the passing of that Act "every order" of the Landed Estates Court was subject to appeal to the House of Lords. Under the Judicature Act, 1877, the jurisdiction vested in the Landed Estates Court passed to the Chancery Division: 40 & 41 Vict., c. 57, ss. 21 (7), 36. Proceedings within the exclusive jurisdiction of the Landed Estates Court are to be commenced in the Chancery Division, and addressed to the Land Judge of that Division: 40 & 41 Vict., c. 57, s. 37 (4). Therefore, the

Chancery Division is the absolute successor of the Landed Estates Court. The same appeal lies from orders made in exercise of the additional jurisdiction so conferred as from orders made under the original jurisdiction of the High Court. Lord Cairn's Act (21 & 22 Vict., c. 27) conferred additional jurisdiction on the Court of Chancery. Has it ever been suggested there was no appeal from orders under it? The right of appeal under the original Landlord and Tenant (Ir.) Act, 1870 (33 & 34 Vict., c. 46), was absolute. The whole Land Code was worked by two separate tribunals—the Land Purchase Court and the Land Commission. There was an express right of appeal from the Land Purchase Court, but no express right of appeal from decisions of the successors of the old Landed Estates Court, the Land Commission. The Act of 1870 was the basis of the Land Code in Ireland, and s. 32 of that Act, giving jurisdiction to the Landed Estates Court, has not been repealed. It was under the facilities to be exercised by the Landed Estates Court for sales of holdings to tenants by ss. 45 and 46 of that Act that the appeal to the House of Lords in *Re Harenc's Trustees' Estate* (3 L. R. Ir. 344) was brought, and it was held incompetent because brought by tenants not parties in the Court of Appeal, and who, therefore, had no *locus standi*. Otherwise there would have been full power to carry the case to this House. Is not the present order one of precisely the same character as that in *Re Harenc's Trus-*

HOUSE OF
LORDS.

March, May,
1908.

HOUSE OF LORDS. *tees?* The Land Judge can act as Judicial Commissioner, or the Judicial Commissioner can exercise the powers of the Land Judge : 59 & 60 March, May, 1906. *Vict., c. 47, s. 23 (1) a, c; Reg. v. Barton* (36 Ir. L. T. R. 105, [1902] A. C. 268) decided that no appeal lay in *certiorari* on the common law side, but in *Fullerton v. Provincial Bank of Ireland* (37 Ir. L. T. Rep. 188, [1903] A. C. 309) this House heard an appeal from the decision of Meredith, J., sitting as Land Judge, without objection.

THE LORD CHANCELLOR (LOREBURN).—My Lords, in the case of this preliminary objection I think it fails. The sole ground upon which it is said that an appeal to the House of Lords is excluded is that the Land Judge must be treated as though he were the Land Commission by virtue of s. 31 (4) of the Act of 1896 ; otherwise it is not questioned, and cannot be questioned, that an appeal would lie. I think there is no ground for the objection. The section referred to deals with the case of a Court receiving new powers, and the measure of competence by which those powers are governed is indicated by the words that the Land Judge shall have the powers “in like manner as if the Land Judge were the Land Commission.” That does not affect appealability in the case of decisions of the Land Judge.

LORD ASHBOURNE.—My Lords, this is a very important preliminary objection which has been discussed before your Lordships with a great

deal of force in resistance to the objection made. I confess that although I am aware that your Lordships have all arrived at the conclusion announced by the Lord Chancellor, I entertain most substantial doubts in regard to the case, and to the validity of the objection. I would be disposed myself to think that it was not the idea in framing this section that this jurisdiction was left open. Although, therefore, as regards the conclusion arrived at, I am prepared to acquiesce in its soundness owing to the weight of authority of those who hold that opinion, I myself entertain as regards the matter very considerable doubt.

House of
Lords.
March, May,
1908.

LORD MACNAGHTEN agreed with the Lord Chancellor.

LORD JAMES OF HEREFORD concurred.

LORD ROBERTSON.—My Lords, in the view which I take the true starting point of this question is that we have here under appeal a decision of the Court of Appeal in Ireland. Unless it is demonstrated that the jurisdiction which the Court of Appeal was exercising was that of an arbiter, and not in its ordinary functions, I should hold that an appeal lay unless there were words of definite exclusion. Accordingly, finding, as I do here, a judgment of the Court of Appeal, and not being pointed to anything that takes away the right of the subject to appeal against that tribunal to the King in Parliament, I am constrained to hold that an

HOUSE OF LORDS.
March, May, 1908.

appeal lies. Accordingly, I absolve myself from a minute tracing of the several jurisdictions of the Land Commission and the Land Judge, and rest my judgment upon the simpler ground.

LORD ATKINSON.—My Lords, I understood that the Land Judge had, before the passing of the Act of 1896, powers somewhat kindred to those that are conferred upon him by this section—namely, to apportion incumbrances and rents, and distribute purchase-moneys, and in the exercise of that jurisdiction the orders which he made would have been subject to appeal to the Irish Court of Appeal, and from that Court to this House. I cannot come to the conclusion that the object of the section of the Act of 1896, to which your Lordships have been referred, was to alter those powers so much as to render them no longer subject to appeal to this House. I think they are merely conferring upon him extended powers very much of the same nature that he exercised before, and to effect similar objects, and therefore I think there is nothing in the objection.

LORD COLLINS concurred.

The appeal was then heard.

Ronan, K.C., and *H. Wilson*, K.C. (*R. H. Macrory* with them), for the appellants.—Section 33 (4) of the Land Law (Ir.) Act, 1896, deals not only with rents but annuities or rent-charges, and it was not intended to perpetrate a manifest injustice in working out the rights of indemnity between tenants so as to take away, in proceedings to which he was no party, rights of the landlord which

he has not given up in fact. They cited 3 Edw.VII., c. 37, s. 62 (3); *Gover's Case*, 1 Ch. Div. 182, 188; *Re Owen's Estate* (No. 3), [1900] 1 Ir. R. 151, 169; *Ex parte Walton*, *Re Levy*, 17 Ch. Div. 746; *Hill v. East and West India Dock Co.*, 9 A. C. 448.

HOUSE OF
LORDS.

March, May,
1908.

D. F. Browne, K.C., and *Pigot* for the respondent.—The landlord gets the capital value of the rent. Under s. 33 (4) of 59 & 60 Vict., c. 4, the House is bound to give to the purchaser of the rent out of the indemnified lands the same right as if he had bought a proportion of the original fee-farm rent. They referred to *Miller v. Salomons*, 7 Exch. 475, 558; *Cox v. Hakes*, 15 A. C. 506, per Lord Herschell at p. 528; *Re Maxwell Close*, X. Quart. Land Reps. 200; [1905] 1 Ir. R. 207, 371; *Re Leader*, X. Quart. Land Reps. 46, [1904] 1 Ir. R. 368; *Re Kemmis' Estate*, IX. Quart. Land Reps. 181, 201, 220, X. Quart. Land Reps. 1, [1904] 1 Ir. R. 496.

Ronan, K.C., in reply.—The powers of redemption and apportionment were complete under 54 & 55 Vict., c. 48, and under that Act the landlord would have had priority, and it was not intended by the Land Law (Ir.) Act, 1896, to alter his previous priority. The landlord is unaffected by equities between the tenants.

The House took time for consideration.

LORD ASHBOURNE.—In this case the appellants insist that they have been damnified by the construction placed upon a section of the Land Law (Ireland) Act, 1896, within whose purview they

HOUSE OF did not come, and which did not purport to apply
LODDS. to them. The questions involved arise in re-
March, May, ference to a fee-farm rent of £404 5s. 2d.
1908. reserved by a fee-farm grant of 1852 (founded
on an original lease of 1745), of which, so far as
unredeemed, appellants are now the owners, and
depend on the construction of s. 33 (4) of the
above Act. By a sub-lease, dated in 1818, part
of the lands, called Hall's part, were demised,
with covenants for perpetual renewal, to Robert
Hall, subject to £17 Irish currency in part of the
rent reserved by the then last renewal of the
lease of 1745—the residue of that rent being
charged on certain of the lands comprised therein
for the purpose of keeping R. Hall, his heirs and
assigns, indemnified from the said rent beyond
the said sum of £17. By an Incumbered Estates
Court Conveyance of 1854 certain of the lands
held under the original lease were granted to
certain parties subject to certain rents, and with
the obligations and rights of indemnity therein
stated. These lands are called in the case “the
indemnifying lands.” By another Incumbered
Estates Court Conveyance of May 9, 1855,
another part of the lands held under the original
lease were granted to Henry Thomson, and they
are called in the case “the indemnified lands.”
The lessor was no party to the lease of 1818, and
the grantor in the fee-farm grant was no party
to the indemnities given by the conveyances of
1854 and 1855. The indemnified lands were sold
under s. 40 of the Land Law (Ir.) Act, 1896,

and by an Order of March 7, 1906, "without prejudice to the existing rights of indemnity," Mr. Justice Ross apportioned the fee-farm rent of £404 5s. 2d. between the indemnified lands and the other lands granted by the fee-farm grant, and £16 7s. 5d. was apportioned on the indemnified lands and £387 17s. 9d. on the other lands. By the same Order it was ordered that the said £16 7s. 5d. should be redeemed, and the redemption price was soon after fixed at £450 4s. This redemption was entirely compulsory, and on the fixing and payment of the redemption price, the appellants' rights and interest in the indemnified lands were gone. There remained, however, the adjustment between the grantees of the different portions of the lands comprised in the fee-farm grant of the rights of indemnity referred to. The respondent raised the question involved in this appeal by a motion before Mr. Justice Ross, that the indemnifying lands should be declared well charged with an annual sum (practically equal to the sum redeemed) in equal priority with the said annual sum of £387 5s. 2d., being the unredeemed part of the fee-farm rent of £404 5s. 2d. It was obvious that this was a grave claim to start against the appellant's property. The indemnifying lands are not now a sufficient security for the portion of the fee-farm rent made primarily payable thereout, and the priority claimed was, as respondent admitted, a complete change in the law and practice heretofore prevailing, but he urged that the

HOUAR OF
LORDS.

March, May,
1908.

HOUSE OF LORDS.
March, May, 1908.

claim could be supported under the literal construction of the section of the Act of 1896 already referred to. Previous to the Act it was admitted that the claim could not be argued; the apportionment and redemption should be worked out by the orders of the Court, and the equities between the parties liable to, or having the benefit of, the indemnities should be adjusted *inter se*, possibly by litigation. This section was a new enactment in the Irish Land Purchase Code, and enabled the Land Judge to deal with and adjust those equities. The Land Judge in the present case decided against the priority claimed, and held that it was the intention of the section to give to the person who had paid the redemption price an annuity on the indemnifying lands equal in amount to the portion of the rent which had been redeemed, but *puisne*, as theretofore, to the unredeemed portion of the head rent. The learned judge thought that the mind of the legislature got into a state of confusion at a certain point in the drafting. I do not think so, but probably a few words might have been added with some advantage. It would be startling and unjust to make an indemnity given by a tenant, and affecting only his own estate, operate so injuriously on the estate of the landlord, although it would be beneficial, and possibly avoid expensive litigation, to have such a section to work out the equities between tenants *inter se*. The words of the section must be construed with some regard to what had been taking place in the

Court, and was its settled law and practice. "The same," in the section, has to be read in connection with the fact that the lands have passed to new purchasers, and that the part of the rent-charge redeemed is gone. The closing words of the section show that the judge was given power to deal with the new needs of the position. It cannot have been intended, without express words, to drag the landowner in for the sole purpose of damaging his estate, while a sufficient purpose can be found in desiring to work out equities between those who were parties to the indemnities. If the larger part of the head rent was redeemed, and then an equivalent indemnity annuity was created which was to rank in equal priority with the residue of the fee-farm rent, payable out of lands unable to pay in full, it is obvious that the owner would find his residue diminished and imperilled. The Lord Chancellor of Ireland, in giving judgment, said that "the landlord is not within the purview of the section at all." In that I concur, but is not that a powerful reason for not damaging him by applying it to him? The Lord Chancellor also said that "in like manner as if he had purchased the rent" means as if he had purchased from the owner of the rent of £404 5s. 2d. But it must be noted that the section avoided the use of any such words. Mr. Ronan, in his powerful argument for the appellant, relied on the cases of *Ex parte Walton* (17 Ch. D. 746) and *Hill v. East and West India Dock Co.* (9 A. C. 448)

HOUSE OF
LORDS.

March, May,
1908.

HOUSE OF LORDS.
March, May, 1908.

as supplying rules of construction which would leave your Lordships free to interpret the section reasonably and so as to avoid injustice. Those two cases show that a statute may be construed contrary to its literal meaning when a literal construction would result in a gross injustice, contrary to what must have been the purpose and object of the provision. In those cases the question turned upon the construction to be given to words of a Bankruptcy Act which said that upon disclaimer of a lease it should be deemed to have been surrendered, and how far they could be held to bind the lessor. In *Walton's Case* Lord Justice James held that the section "must be understood as saying as 'between the bankrupt and the lessee' the lease must be deemed to have been surrendered." The same learned judge also said that "in interpreting the section it must be understood with qualifications to prevent most grievous injustice and most revolting absurdity." Jessel, M.R., also used language strongly to the same effect, and held that the section must be read "so as not to interfere with the rights of third parties." *Hill's Case*, which has the authority of this House, adopted and relied on the reasoning in *Walton's Case*, and laid down that before adopting a literal construction, which would do obvious injustice, it was essential to consider what is the object of the provision, and to see what its purpose is. Lord Cairns in his judgment said: "To take the section literally would be to do

that for which there is no motive, no explanation, and to destroy the rights and property of third persons." Lord Blackburn strongly expressed the same view, and held that the provision should be read as meaning that the lease was only to be deemed to be surrendered "so far as is necessary to effectuate the purposes of the Act, and no further, and so avoid a cruel injustice." It is to be regretted that, as your Lordships have been informed, these authorities were not mentioned in the Court of Appeal in Ireland. I think that the Order of the Land Judge was correct, and the appeal should be allowed with costs.

HOUSE OF
LORDS.

March, May,
1908.

LORD MACNAGHTEN.—I think the order of Ross, J., was right. It seems to me that the learned judge did what he was told to do by s. 33 (4) of the Land Law (Ir.) Act, 1896, and that he performed his allotted task with a due regard to the equities of the parties interested. The position of things may be described roughly, but with sufficient accuracy, in a very few words. Two persons, A. and B., are owners in severalty of two lots of land, which I will call lot A and lot B. These two lots originally formed one property. The property was subject to one entire fee-farm rent. On severance it was arranged that lot A should indemnify lot B. The superior landlord, of course, was no party to this arrangement. His rights and remedies were left untouched. As between lot A and lot B,

HOUSE OF
LORDS.

March, May,
1908.

so long as A. duly paid the head rent and kept lot B indemnified there was nothing more that A. could be asked to do. Then comes the disturbing element of Irish land legislation. The occupying tenants on lot B purchase their holdings with money advanced by the State. In order to carry out the purchase it is necessary that incumbrances and charges should be cleared off. That is an essential condition in all cases of State-aided land purchase in Ireland. In accordance with statutory provisions in that behalf, the head rent is apportioned. The amount thrown exclusively on lot B is then redeemed by the application of a portion of the purchase-money, to which all incumbrances and charges on the purchased property are transferred by the operation of the Land Purchase Acts as amended by the Act of 1896. Now, if it had not been for s. 33 (4) B.'s right of indemnity would still have remained in force for what it might be worth. The right of indemnity in such a case was expressly preserved from the very first. There is a saving clause to this effect in s. 33 of the Encumbered Estates Act of 1849. That clause is re-enacted in the very same words in s. 69 of the Act of 1858. But there are no provisions for adjusting equities until you come to the Act of 1896. So it would have been necessary for B., if the case had arisen before that Act, to have sued in Chancery for relief, and then probably A. would have objected that it was not his fault that a payment to the head landlord had been

made out of purchase-money destined for B. The payment, he might have said, was not made at his request ; he was, therefore, not liable for the consequences ; certainly he was not bound to recoup B. for a voluntary outlay. Whatever his liability might be, that was not the bargain. Here I must part company with the learned Land Judge for a moment. I cannot agree with him in thinking that "at this point the mind of the legislature . . . got into a state of confusion." I think the framers of the Act saw the difficulty clearly, and avoided it with no little skill. Instead of giving B. a charge on lot A for the amount deducted from the purchase-money, which might have been highly inconvenient to the owner of lot A, and was certainly never contemplated when the indemnity was created, it is explained that, in relation to the owner of lot A, B. is to be regarded as entitled by purchase to the rent apportioned in respect of lot B and redeemed out of the purchase-money advanced by Government. That, of course, is as between B. and lot A. The head landlord has nothing to do with equities between B. and A. As the Lord Chancellor justly observes, the landlord is not within the contemplation of the section at all. For the apportioned rent thrown exclusively on lot B and then transferred to the purchase-money he has been fully paid. He is out of the case altogether. I do not think that the framers of the Act are to blame for not deeming it possible that a Land Judge administering equity as

HOUSE OF
LORDS.

March, May,
1908.

HOUSE OF LORDS.
March, May, 1908.

between A. and B. would go out of his way to derogate from the rights of a third person who had nothing whatever to do with the matter in hand. The process vulgarly described as robbing Peter to pay Paul is not a principle of equity, nor is it, I think, lightly to be attributed to the legislature even in an Irish Land Act. But that is exactly the effect of the order under appeal. As between A. and B., A. was primarily liable, and B. was only surety. The order adjusts equities between A. and B. by giving B. a charge on the head landlord's securities, and declaring that B. is to rank against those securities *pari passu* with the head landlord. The Lord Chancellor says that is the plain meaning of the Act. I do not think the Act means or says anything of the kind. The Act says that "the person entitled to the purchase-money shall be entitled to the proportion of the . . . rent . . . redeemed in like manner as if *he* had purchased the same." The emphasis, I think, is on the word "*he*." In point of fact *he* did not purchase it. He did not want to purchase it. The State buys and charges him with the purchase-money in the deal with the occupying tenants, but as regards the principal debtor the Act says he is to be treated as purchaser. Then the Act tells the Land Judge to carry out the transaction on that footing, leaving the details and the machinery to the judge's discretion. I have only to add that the authorities cited on the one side and on the other do not seem to me to throw any light on

the question before your Lordships. As I read the section, there is no "statutory fiction" here. There is an illustration given to explain B.'s position and the rights intended to be secured to him. The illustration seems to me to be simple enough and easy of application, and it is followed by words giving the Court ample powers to carry the enactment into effect. On the other hand, canons of construction, which may be of use when the language to be construed is ambiguous or contradictory, are hardly wanted where the meaning is perfectly plain. I think the decision of the Court of Appeal should be reversed with costs, and the order of Ross, J., restored.

HOUSE OF
LORDS.

March, May,
1908.

LORD ATKINSON delivered a judgment in favour of a restoration of the judgment and order of Ross, J.

LORDS JAMES of HEREFORD, ROBERTSON, and COLLINS concurred.

THE LORD CHANCELLOR (LOREBURN).—My Lords, I agree with the conclusion arrived at, that in reading the section which your Lordships are called upon to interpret the words should be construed so as not to injuriously affect the interests of third parties whom it was not the purpose of the Act to touch.

Appeal allowed with costs, and the judgment of Ross, J., restored.

HOUSE OF LORDS.
—
Solicitors for the appellant : *Crawley, Arnold & Co.*, agents for *S. S. & E. Reeves & Sons*,
March, May, Dublin.
1908.

Solicitors for the respondent : *J. H. & K. R. Cobb*, agents for *Thomas F. O'Connell & Son*,
Dublin.

[*Note up on pp. 571 and 574 of Cherry and Wakely's Land Acts, 3rd Edition, 1903; and on pp. 1089 and 1129 of Cherry's Irish Land Act, 1903.*]

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZ-
GIBBON and HOLMES, L.JJ.)

WARNOCK v. JOHNSTON.

May 11, 12, 1908.—*Landlord and tenant—Originating notice to fix fair rent—Transfer of proceedings—Undertaking not to institute proceedings against tenant pending hearing of application—Ejectment for non-payment of rent—Decree—Estoppel.*

APPEAL.
May, 1908.

An originating notice to have a fair rent fixed in the County Court was served by a tenant in Dec., 1905, and on March 10, 1906, an order was obtained by the landlord transferring the proceedings from the County Court to the Land Commission. This order was obtained upon an affidavit by the landlord's agent stating that the transfer proceedings were not brought for the purpose of delay, but for the sole purpose of having the rent fixed by the Land Commission instead of the County Court Judge. The order was made on the terms that no proceedings by ejectment or otherwise should be instituted pending the fixing of the fair rent. On Feb. 15, 1906, the landlord had issued a civil bill ejectment for non-payment of rent, and on March 13, 1906, without any defence, a decree in ejectment was granted.

APPEAL.
May, 1908.

On May 1 a caretaker notice was served on the tenant, and when the fair rent application came before the Sub-Commission in Dec., 1906, it was dismissed on the ground that the tenancy had been determined. In an action by the tenant to have it declared that he was, notwithstanding the decree in ejectment, a present tenant of the holding, and entitled as such tenant to have a fair rent fixed :

Held (reversing BARTON, J.), that the action should be dismissed, as it was not founded upon any known equity, because by plaintiff's own conduct his status as a tenant had ceased when the fair rent application came before the Court, and that the undertaking in the order transferring the proceedings could not apply to an accrued arrear in respect of which at the time a civil bill in ejectment had been issued.

Appeal from Barton J.

The facts are stated at p. 89 *ante*.

Fetherstonhaugh, K.C., and Gaussen for the appellant.

Molony, K.C., Horner, K.C., and M'Loone for the respondent.

SIR S. WALKER, BART., L.C., said that he was sorry that this proceeding had been taken, because it appeared to be quite contrary to all their ideas of practice and the rules of equity. Taking the history of the case, and the dates, the course taken by Warnock himself put him out of court in a Court of Equity. He owed three years' rent. In Dec., 1905, the notice of transfer was given, supported by an ordinary affidavit. Mr. Lipsett

showed cause upon the ground that the case could be heard at the following January Sessions ; that negotiations for sale were pending ; and that otherwise it could not be heard before the sale of the estate. For that reason he said the application was for delay. Mr. Hewson, the agent, said it was not for delay, as the negotiations had been broken off. When in March, 1906, the ejectment came on for hearing before the County Court Judge, the plaintiff made no defence, and a decree was given. On May 1 the landlord turned him into a caretaker. The motion for transfer stood over by common consent, and came on on March 10, when the application to have a fair rent fixed was transferred to the Land Commission with an undertaking not to institute, without leave of the Court, any proceeding against the tenant for rent, by ejectment or otherwise, pending the hearing of that application. That could not apply to an accrued arrear which at that time the tenant knew an ejectment civil bill had been issued for. There was no undertaking to do anything about that. If there was the Court before which it was given should be the Court to enforce it. It was right to say that Mr. Justice Barton did not base his decision on that undertaking, but on something in the affidavit of the agent. The originating notice came before the Court on June 29, 1906. If there was nothing else in the case it appeared to him that the proceedings from that date

APPEAL.

May, 1908.

APPEAL.
May, 1908.

prevented the tenant from having any equity such as was here put forward. It was adjourned on that date pending redemption. That was in case of the tenant and to prevent the consequences which would legally follow from his not being a tenant at all when the fair rent proceeding came on. The full time elapsed, and he did not redeem. In Dec., 1906, the fair rent application was dismissed on the ground that the applicant's status as tenant had ceased and that he was no longer in a position to maintain a fair rent proceeding. Next, this action was instituted on April 20, 1907; the plaintiff never took any step until his status as tenant was absolutely and irrevocably gone. They would dismiss the case as not being founded upon any known equity, and also upon the ground that the tenant had long ago, by his own conduct, abandoned any claim he could have had.

FITZGIBBON, L.J., said that there never was any equity in the case. The rights this man had, whatever they were, were gone owing to his own failure to perform the necessary condition under which alone he could retain his tenancy in these lands. The suit was absolutely unsustainable from its commencement.

HOLMES, L.J., said that two points were relied on by the tenant—one was that there was a contract by the defendant that he should do nothing to disturb the possession until the fair rent was fixed, and the other was that the landlord was

estopped, by certain proceedings he had taken and certain statements he had made, from contending in the Land Commission Court that the plaintiff was not entitled to have a fair rent fixed. He entirely agreed with Mr. Justice Barton, that as far as contract was concerned the plaintiff could not succeed. In considering the question of estoppel, Mr. Justice Barton relied upon a paragraph in the affidavit of the landlord's agent when applying for a transfer to the Land Commission. It was a curious thing that Mr. Justice Barton says there was not any ground for alleging fraud against anybody concerned with this matter, and they had not heard the allegation that there was anything fraudulent in the affidavit. In the absence of fraud he did not see how the plaintiff was in any better position than if he rested his case on contract. When the case came before the Court ultimately it was not merely that there was no tenancy; but there was no chance of restoring the tenancy without the consent of the landlord. In these circumstances the judgment of Mr. Justice Barton was founded on a misapprehension.

APPEAL.

May, 1908.

Solicitor for the appellant: *Alfred Stubbs*.

Solicitor for the respondent: *Louis Lipsett*

[*Note up on pp. 284, 324, 556, and 734 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZGIBBON
and HOLMES, L.JJ.)

In the Matter of the Estate of WILLIAM WINTER
AND ANOTHER.

APPEAL. June 26, 1908.—*Tithe rent-charge—Statute of*
June, 1908. *Limitations—Discontinuance of receipt—Payment*
 by person not liable—Real Property Limitation
 Acts, 1833, 1874—3 & 4 Will. IV., c. 27, s. 3 ;
 37 & 38 Vict., c. 57, s. 1.

Where a tithe rent-charge, payable to the Irish Land Commission, was not paid for a period of three and a half years, and at the end of that time the Land Commission, acting upon incorrect information, applied to the agent of a third party (who was not in any privity with the owners of the lands liable, and whose lands had never been subject to the particular tithe rent-charge), and received from him payment of the arrears and of all subsequent gales as they accrued due :

Held (reversing the decision of WYLIE, J., that there had not been a discontinuance of receipt within the meaning of s. 3 of the Real

Property Limitation Act, 1833, inasmuch as the entire amount, though paid by a third party, had in fact been paid to the Land Commission, and they had given receipts therefor discharging the lands; that, accordingly, the claim of the Land Commission to the redemption price of the tithe rent-charge was not barred by statute.

APPEAL.
June, 1908.

Question arising on allocation of the purchase-money of an estate sold under the provisions of the Irish Land Act, 1903. The facts are fully stated in the judgment of Wylie J.

WYLIE, J.—In this case the Land Commission claim that the purchase-money is liable to redeem a tithe rent-charge of £6 14s. 2d., alleged to have been payable at the date of sale out of the lands sold. The vendors admit that the lands were formerly liable to pay this tithe rent-charge, but rely upon the Statute of Limitations as a bar to the claim now made. All the material facts have been clearly ascertained, and are now admitted by both parties. The lands formerly belonged to Thomas John Kearney, Deputy Assistant Quartermaster-General, who, by his will, which was proved in September, 1857, demised them to trustees for his infant daughter, Bertha Kearney. By a conveyance of Aug. 4, 1876, the said trustees conveyed the lands to Bertha Kearney, after she attained age, and by her marriage settlement of Jan. 3, 1877, she conveyed the lands to trustees upon trust to sell. The vendors are the present

APPEAL.
June, 1908.

trustees of the settlement. In a schedule to each of the said deeds this tithe rent-charge was set out as a charge upon the lands, and was duly paid up to 1886 on behalf of the owners, first by an agent named Delahunt, and afterwards by an agent named Howard, who was the Town Clerk of Waterford. For three and a half years after 1886, the receivable order for each half-yearly payment was sent in due course to Howard, but no notice was taken of any of them, and no payment was made. The Church Property Department thereupon, according to what is stated to have been their usual course, sent a number of queries to the clerk of the union, asking (1) the name of the owner of the interest which Captain Kearney had in these lands described as Dunhill, Parish of Dundalk, in the County of Kilkenny, and (2) the name of the person to whom the tenants paid their rents. The clerk answered the first question by giving the name of Charles Tottenham, Esq., 1 Grosvenor Place, London, and the second question by giving the name of Lewis J. Waters, Esq., 27 Patrick Street, Kilkenny, and, accordingly, in Dec., 1890, a receivable order for three and a half years' arrears of the tithe rent-charge payable by Charles Tottenham out of the lands of Dunhill was sent to Mr. Waters, his agent. Now, it so happened that Charles Tottenham had succeeded another man named Kearney as the owner of lands called Annfield, adjoining the lands sold

in this matter, which were also known as part of the lands of Dunhill, and Mr. Waters, who had then recently become agent, having no reason to doubt the accuracy of the receivable order, paid the three and a half years' arrears on behalf of Charles Tottenham out of the rents and profits of Annfield, and continued to pay the tithe rent-charge up to 1907, when the question of liability was raised in this matter. Now, it being admitted that no payment has been made or acknowledgment given in respect of this tithe rent-charge by or on behalf of the owners of the lands sold since 1886, the question is, whether the payment by mistake, under the circumstances mentioned, by Mr. Waters, as agent for a third party, who had not then, and never had any estate or interest in the lands sold, and who was not in privity in any way with the owners thereof, prevents the owner of these lands from relying on the Statute of Limitations. I cannot imagine how there could be any doubt as to the proper answer to that question. But counsel for the Land Commission contends that they were not guilty of any laches or any default or neglect in respect of requiring or enforcing payment against the owners of the lands liable thereto, and that, therefore, the statute does not run against them. In support of that contention counsel relied upon three cases cited by him—viz., *Adnam v. Earl of Sandwich*, 2 Q. B. D. 485; *Irish Land Commission v. White*, I. Quart. Land Reps.

APPEAL.

June, 1908.

APPEAL.
June, 1908.

217; [1896] 2 Ir. 410; and *Irish Land Commission v. Farrelly*,* decided by Wright, J., a print of whose judgment I have had an opportunity of reading. But each of those cases differs materially in its facts from this case. In each of those cases the owner of the lands liable to the rent-charge continued to pay it after he had conveyed away the estate which was liable to pay, and the persons entitled to the rent-charge continued to receive it after such conveyance from the same persons, and in the same manner as formerly, without any

* *The Irish Land Commission v. The Reverend Charles Farrelly*. Civil bill appeal heard by the Judge of Assize for the County of Meath at the March Assizes, 1902. Judgment was reserved and delivered on June 23, 1902.

WRIGHT, J.—This was a civil bill brought by the Irish Land Commission claiming the sum of £17 15s., being twelve and a half years' arrears of tithe rent-charge due to May 1, 1901, out of the lands of Ervey, in the County of Meath. The case was heard before the County Court Judge (Judge Curran) at the Sessions at Navan, and an order was made by him, on Feb. 3 last, dismissing it without prejudice. From that dismiss the present appeal was taken, and was heard by me at the recent Trim Assizes. The question was altogether one of law—viz., whether, under the circumstances, the Statute of Limitations applied or not—and I thought it would be more satisfactory to reserve judgment until I had an opportunity of looking into the authorities. The facts are as follow:—Portion of the estate of Edward S. O'Reilly was sold in the Land Judges' Court in the year 1882 to a gentleman named Lucas, who in the year 1894 sold this portion to the defendant. In the rental prepared on the occasion of the sale in the Land Judges' Court it was set out that this portion was subject to the tithe rent-charge in question. Other portions of O'Reilly's estate remained unsold, a gentleman named

knowledge of any transmission of interest, and the Court in each case accordingly held that there was no "discontinuance of receipt" within the meaning of s. 3 of the statute. But in this case, notwithstanding that no notice was taken of their half-yearly demands for three and a half years, they neglected to enforce payment during that period, and at the end of that period, believing that there was a change of ownership, instead of ascertaining definitely for themselves why it was that the Town Clerk

APPEAL.
June, 1903.

Synge was appointed receiver of this unsold portion, and he, under a mistake, paid the tithe rent-charge, due out of the lands which had been sold, down to the year 1898 when the mistake was discovered. I am satisfied that the Land Commission were not guilty of any laches. Two authorities were referred to by Mr. Greer on behalf of the plaintiffs—viz., *The Irish Land Commission v. White*, I. Quart. Land Reps. 217, a decision of the Exchequer Division in this country, and *Adnam v. the Earl of Sandwich*, a decision of the English Queen's Bench Division. The latter case is a very strong one. [His Lordship then reviewed the facts and judgments in both these cases.] Now, in the present case, I hold that up to 1898 the Irish Land Commission did not know of the conveyance in 1882, and could not reasonably have discovered its existence. They were not in default, and did not sleep on any right they knew of. They were receiving the tithe rent-charge, and did not know that they were receiving it from a person not liable. I hold, therefore, that the defence of the Statute of Limitations fails. The decree of the learned County Court Judge must be reversed, and a decree given for the amount claimed. . . .

On a case stated to the Court of King's Bench, the judgment of Mr. Justice Wright was affirmed on Feb. 26, 1903, the question in the case stated—viz., "Is the plaintiffs' claim barred by the Statute of Limitations?" being answered in the negative.

APPEAL.
June, 1908.

of Waterford was ignoring these receivable orders, they chose to act upon false information, innocently given to them by the clerk of the union, and succeeded in obtaining from the agent of a stranger to the lands, and to the owners, payment, not only of the arrears then due, but of all future gales. In my opinion there was a clear discontinuance of receipt in this case for three and a half years, causing the statute to run from the last payment in 1886 in favour of the owners of the lands, and the subsequent payment, by an entire stranger, of the arrears and future gales could not, in my opinion, prevent its running on for the full period. I therefore disallow the claim.

Appeal by the Irish Land Commission from decision of Wylie, J.

Ronan, K.C., *Meredith*, K.C., and *Leech* for the appellants.—*Adnam v. Earl of Sandwich*, 2 Q. B. D. 485; *Irish Land Commission v. White*, I. Quart. Land Reps. 217; 30 Ir. L. T. R. 97; and *Irish Land Commission v. Rev. Charles Farrelly*, p. 160 n. ante, are indistinguishable from the present case; the person who paid the amounts in these cases was just as much a stranger to the estate as in the present instance. The Land Commission received the entire amount due, and gave receipts therefor. They were not guilty of laches or neglect.

Serjeant O'Connor, K.C., and *Carrigan* for the respondent.—The facts in this case are different from those in the cases cited. Here there was

a total discontinuance of payment for three and a half years. The Land Commission neglected to enforce payment during that period and then accepted payment from an utter stranger to the estate.

APPEAL.
June, 1908.

[FITZGIBBON, L.J.—There was an interruption in receiving the tithe rent-charge, but is that a discontinuance of receipt within the section? The Land Commission have received the entire amount due, and have given receipts which discharge these lands.]

There is no privity between us and the person who paid the money. In *Adnam's Case* there was no laches or neglect on the part of the rightful owner.

[HOLMES, L.J.—Here the Land Commission erroneously thought there had been a transfer or change of interest to the person who made the subsequent payments.]

Our contention is that they did not make proper or sufficient inquiry. If they had done so, they would have found out the mistake.

SIR S. WALKER, BART., L.C.—There can be very little doubt on the wording of the statute as to what should be our decision in this case. To come within the statute there must be a dispossession or discontinuance in receipt of the rent. In the present case so far were the Land Commission from discontinuing being in receipt of the tithe rent-charge that, when they found that the

APPEAL.
June, 1908.

amounts were not being paid, they applied to the clerk of the union to ascertain who was the proper person liable to pay. They were told that Charles Tottenham was the owner, and that Waters was his agent. They accordingly applied for payment, were paid the money, received it, and gave a receipt discharging the lands. That continued from year to year, these receipts being given to Mr. Waters on behalf of Mr. Tottenham. In 1903 Mr. Waters discovers that the payments had been made by him by mistake, and makes a statutory declaration to that effect. Under the circumstances it would be impossible for us to hold that there had been a discontinuance of receipt within the meaning of the section. They did, in fact, get the money, and gave a receipt for it. The claim is not statute barred, and the Land Commission are entitled to the redemption price of the tithe rent-charge.

FITZGIBBON, L.J.—I thoroughly agree.

HOLMES, L.J., concurred.

Solicitor for the Irish Land Commission:
William Alexander.

Solicitor for the vendors (respondents): *P. A. Murphy.*

[*Note up on p. 568 of Cherry and Wakely's Land Acts, 3rd Edition, 1903, and on p. 1129 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of WILLIAM TOKE
DOONER.

Jan. 21, 1908.—*Land Purchase Acts—Practice—Redemption of superior interests—Costs of parties entitled—Sum retained insufficient.*

LAND
COMMISSION.
Jan., 1908.

On the sale of an estate under the Irish Land Act, 1903, the redemption price of an apportioned part of an annuity was fixed by consent, a sum named by the solicitors for the annuitant as sufficient for their costs was retained, and the residue of the funds was paid to the vendor. The costs of the annuitant, when taxed and ascertained, considerably exceeded the sum retained. On an application by the annuitant that the vendor be ordered to lodge in Court to the credit of the matter a sum representing the difference between the taxed costs of the annuitant and the sum retained in Court :

Held, that the vendor should not be directed to bring the amount into Court, but that an order should be made declaring the annuitant entitled to the payment of the amount by the vendor.

Motion on behalf of Mrs. Zillah Adelaide Mylchreest for an order that the vendor do

LAND
COMMISSION.
Jan., 1908.

lodge in Court to the credit of this matter the sum of £20 19s. 2d., representing the difference between the taxed costs of the said Zillah Adelaide Mylchreest and the sum of £21, portion of a sum of £25 retained in this matter. The said Zillah Adelaide Mylchreest was entitled to part of an annuity which had been apportioned and partially redeemed, and a sum of £25 had been retained in Court to meet her costs. The sum of £25 was the amount named by the solicitors for Mrs. Mylchreest, in a letter to the solicitors for the vendor, dated July 21, 1905, as the sum which they desired should be retained to meet their costs. A sum of £4 had been paid out of the said sum of £25 to a life annuitant, whose annuity was charged on the interest of Mrs. Mylchreest, in respect of proving her title. On Dec. 5, 1907, after the funds had been allocated and the residue paid to the vendor, the solicitors for Mrs. Mylchreest wrote to the solicitors for the vendor stating that their costs had been taxed to £41 19s. 2d., and asking that £20 19s. 2d., being the difference between that sum and the £21 remaining in Court, should be brought into Court or handed over to them by the vendor, and, on Dec. 6, 1907, the vendor's solicitors replied that the matter had been disposed of so far as the owner was concerned, and pointed out that the amount retained in court was the amount that the annuitant's solicitors had named as the proper and sufficient sum for their costs.

C. Atkinson, for Mrs. Mylchreest, referred to *Innes' Estate*, XII. Quart. Land Reps. 28; 40 Ir. L. T. R. 214, and asked that the vendor be ordered to bring the amount into Court.

LAND
COMMISSION.
Jan., 1908.

G. Horan for the vendor.

WYLIE, J.—I will not direct the vendor to bring in the amount, but will make an order declaring Mrs. Mylchreest entitled as against the vendor to payment.

The curial part of the order made was as follows :—

“The Court doth declare the said Mrs. Zillah Adelaide Mylchreest entitled as against the vendor herein to the sum of forty-one pounds nineteen shillings and twopence as and for her costs incurred in respect of the claim appearing at the said item No. 7 B. on the said Final Schedule of Incumbrances herein, together with five pounds five shillings costs of and incident to this order. And the Court doth order that the balance of the retainer at No. 7 B, be discharged and the amount thereof—viz., twenty-one pounds—paid to Messrs. William Smyth & Son, solicitors for the said Mrs. Zillah Adelaide Mylchreest on account of the said sum of forty-one pounds nineteen shillings and twopence.

Solicitors for Mrs. Mylchreest : *William Smyth & Son*.

Solicitors for the vendor : *Horan & Devine*.

[*Note up on pp. 384, 821, and 864 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLLIE, J.)

In the Matter of the Estate of M. J. MALONE AND
OTHERS.

LAND
COMMISSION
—
March, 1908.

March 12, 1908.—*Land Purchase Acts—Limitation on advances—Purchase of Land Amendment Act, 1888, s. 2—Irish Land Act, 1903, s. 1 (1, 4).*

The tenant of a holding who had previously obtained advances under the Land Purchase Acts to the amount of £2,694 entered into an agreement for the purchase of a holding, and applied for an advance of £1,325, which price came within the zones. The Estates Commissioners were prepared to advance a sum of £306, but were not of opinion that it was expedient to make an advance in excess of that sum :

Held, that they were not bound to make any advance which, taken together with the prior advances, would make the total amount advanced to the purchaser under the Land Purchase Acts exceed £3,000.

Questions of law submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The facts were as follow :—
On Nov. 16, 1903, the owners lodged an originating request instituting proceedings for the sale

to the Land Commission of 22a. 1r. 26p. of the lands of Corbally, held by Robert M'Namara, as a yearly tenant, under the provisions of s. 6 of the Irish Land Act, 1903, but, as there was then pending an appeal against a decision of a Sub-Commission fixing a fair rent, on the ground that the Land Law Acts did not apply, the Estates Commissioners, in the exercise of their discretion, refused to declare the lands an estate. On Dec. 19, 1905, the Land Commission confirmed the order of the Sub-Commissioner fixing a fair rent on the holding. The owners then proceeded to sell the lands direct to the tenant pursuant to s. 1, the originating request being modified to an originating application for an advance of £1,325, which, together with a purchase agreement, was lodged in the Land Commission on Jan. 2, 1906. The Estates Commissioners, having regard to the decision of the Land Commission on appeal, in accordance with their then practice, provisionally declared the lands fit to be regarded as an estate. The said holding comprised the entire estate of the vendors. The advance of £1,325 applied for by the tenant came within the provisions of s. 1 (1) of the Act of 1903, but the tenant had already obtained two advances under the Land Purchase Acts—one of £1,444 and one of £1,250—making together a total sum already advanced by the Land Commission of £2,694. The memorandum of the Estates Commissioners further stated that the Estates Commissioners

LAND
COMMISSION.
March, 1908.

LAND
COMMISSION.

March, 1908.

were prepared to advance a sum of £306 to the said tenant to assist him to carry out the proposed sale, such sum of £306 making, with the said sum of £2,694 already advanced to the purchaser, the sum of £3,000, but it was not in their opinion a case in which it would be expedient to make an advance to the said tenant in excess of the said sum of £306 for the purpose of carrying out the sale of the holding. The Commissioners, at the request of the tenant, referred the following questions of law to the Judicial Commissioner for decision :—(1) Whether the Estates Commissioners have power, notwithstanding the limitations as to advances contained in the Purchase of Land (Ir.) Amendment Act, 1888, to sanction the advance applied for by the said Richard M'Namara for the purchase of his holding? (2) Whether, having regard to the fact that the purchase annuity payable in respect of the price agreed on for the purchase of the holding is within the limits prescribed by s. 1 (1) (a) of the Irish Land Act, 1903, and that the advance now applied for, together with the advances already made to the tenant, would not exceed £7,000, the Commissioners are bound to sanction the advance applied for?

Ronan, K.C., for the tenant.—The question turns on s. 2 of the Purchase of Land (Ireland) Amendment Act, 1888, and s. 1 of the Irish Land Act, 1903. A narrow construction ought not to be put on the former section where there

is no doubt as to the adequacy of the security. See note to s. 1 (4) of the Act of 1903 in Sullivan's Irish Land Acts and *Shaw v. Townshend*, V. Quart. Land Reps. 267; 34 Ir. L. T. R. 191. The Estates Commissioners would be bound to make advances to the purchasing tenant up to £3,000. The judicial discretion conferred upon them as to making advances in excess of that sum must be exercised when the conditions necessary for its exercise exist. The only possible ground on which they could refuse to expend that sum would be want of security. But the statute has declared that in such cases the security must be regarded as sufficient. The Estates Commissioners are therefore bound to make the advance applied for in this case.

LAND
COMMISSION.
March, 1908.

Herbert Wilson, K.C., and *W. Q. Murphy* for the landlord.

Serjeant O'Connor and *Dudley White* for the Treasury.

WYLIE, J.—It seems to me that the law is clear. Prior to the Act of 1903 no one could question the decision arrived at by the Land Commission as to the amount of an advance to be made in any particular case. The first time it is made compulsory on the Land Commission to make the advance applied for in a particular case is in the case of a holding coming within the provisions of s. 1 (1) of the Irish Land Act, 1903. That section obliges the Land Commission,

LAND
COMMISSION.

March, 1908.

where an application is made for the advance of the whole purchase-money of a holding, to sanction the advance applied for, in any case therein mentioned, if they are satisfied that the tenant is in occupation of the holding, subject, however, to the limitations in the Land Purchase Acts on advances to tenants purchasing their holdings. The limitations cannot be exceeded unless the Land Commission think it expedient to advance a larger sum within certain higher limits mentioned. Accordingly, the only amount the Land Commission would be bound to advance to any one purchaser, in cases coming within s. 1, would be £3,000, including in that £3,000 any sums already advanced to the same purchaser for his own benefit, and not as trustee (Act of 1896, s. 30). The only ground on which the purchaser would be entitled to a larger sum would be that the Land Commission thought it expedient to advance a larger sum for the purposes mentioned in s. 2 of the Act of 1888 or s. 1 (4) of the Act of 1903. Accordingly, where the Estates Commissioners have expressed the opinion that it would be inexpedient to advance a larger sum than £3,000—which, I take it, is the meaning of the case stated—to the purchasing tenant, they are not bound to advance a larger sum. I answer question (2) in the negative. As to question (1) my answer is in the affirmative, with this qualification—“provided the Estates Commissioners consider it expedient to make the larger advance applied for, for the purposes

mentioned in s. 2 of the Act of 1888 or s. 1 (4)
of the Act of 1903.

LAND
COMMISSION.

March, 1908.

Solicitor for Richard M'Namara : *F. M. Fitt.*

Solicitor for the Treasury : *W. G. Towers.*

Solicitors for the landlord : *J. Kearney & Son.*

[*Note up on p. 452 of Cherry and Wakely's Land Acts, 3rd Edition, 1903, and on p. 1052 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before FITZGERALD, J.)

Executors of SMYTH (Claimants): NICHOLSON
(Respondent).

LAND
COMMISSION.
Feb., Mar.,
1908.

Feb. 26; Mar. 26, 1908.—*Land Law Acts—
Compensation for disturbance—Order of Land
Commission fixing—Interest—Land Act, 1870—
Land Law Act, 1881—3 & 4 Vict., c. 105, ss.
26, 27.*

*An order by the Land Commission (on appeal
from the Civil Bill Court) fixing compensation for
disturbance under the Land Law Act, 1870, does
not carry interest.*

Application on behalf of the claimants for
leave to issue execution against the respondent
for the sum of £1,000, together with £103 15s. 6d.,
being interest on the said sum of £1,000 from
March 30, 1905, to Nov. 2, 1907, at the rate of
£4 per cent. per annum, and for the costs of the
application. Prior to the year 1902 the respon-
dent had recovered in ejectment, and gone into
possession of, a certain holding subject to the
Ulster tenant-right custom. The claimants sub-
sequently claimed compensation under the Land
Law (Ir.) Act, 1870, in respect of the benefit of
the Ulster tenant-right custom, or alternatively in
respect of disturbance and for improvements.

The respondent served a notice of dispute and set-off. By a decree of the Recorder of Londonderry dated June 14, 1902, reciting that the claimants had established their claim in respect of the benefit of the Ulster tenant-right custom, and that the respondent had failed to establish his set-off, and every part thereof, it was ordered that the respondent should pay to the claimants, in respect of their claim under the Ulster tenant-right custom, the total sum of £1,360, together with £16 5s. 8d. taxed costs of their claim. The claimants and respondent having appealed, the appeal came before the Hon. Gerald FitzGerald, Judicial Commissioner, and one lay assessor, in accordance with the provisions of s. 88 (2) of the Irish Land Act, 1903, and by order dated March 30, 1905, it was ordered that the claimants be allowed the sum of £1,000 (in lieu of the sum of £1,360 awarded by the Recorder of Londonderry); that the said decree should stand affirmed in all other respects; and that the parties should abide their own costs of the appeal.

LAND
COMMISSION.
Feb., Mar.,
1908.

Osborne for the claimants.

Henry, K.C., with whom was *Bird*, for the respondent.

Cur. adv. vult.

FITZGERALD, J.—The question has arisen in this case—viz., whether an order of the Land Commission, modifying, as to amount, an order of the County Court fixing compensation under the Land Act of 1870 for Ulster tenant-right,

LAND
COMMISSION.
—
Feb., Mar.,
1906.

carries with it interest at 4 per cent. on the amount from the date of the order of the Land Commission until paid. The Recorder of Derry fixed the amount of compensation payable by the landlord to the tenant at £1,360, with £16 5s. 8d. costs, and on March 30, 1905, the Land Commission reduced this sum of £1,360 to £1,000, and directed the parties to bear their own costs of the appeal to the Land Commission. The case was not finally decided until Nov. 7, 1905, when the Court of Appeal confirmed the order of the Land Commission, but the amount of the decree has never been paid, apparently owing to a dispute between the parties as to whether it bore interest or not, and the present application by the tenant is for leave to issue execution for £1,000 and £16 5s. 8d. costs, together with £103 15s. 6d. interest at 4 per cent. on the £1,000 from March 30, 1905, to Nov. 1, 1907. The practice of the Land Commission in reference to issuing execution in cases under the Land Act of 1870 is that if the decree of the County Court Judge is confirmed his original decree is executed, and the Land Commission issue a *fi. fa.* only for the amount of the costs of the appeal in case they are awarded. But if the amount of compensation decreed by the County Court Judge is modified, then the Land Commission issue a *fi. fa.* for the amount so modified and for the amount of any costs awarded: *O'Brien v. Leader*, 30 L. R. Ir. 531. Under the Land Act of 1870 the order of the Court fixing

the amount of compensation is to be reduced to writing in the form of a decree or award (s. 19), and the Court is to be the Civil Bill Court (s. 22), and the Judge of the Civil Bill Court shall have the same power, jurisdiction and authority as in the case of civil bill ejectments (s. 23), and any order made under the Act may be enforced by attachment or otherwise in the same manner as if it was the order of any of the Superior Courts of Common Law, and if such order be for the payment of money, it may also be enforced in the same manner as a civil bill decree for a money demand (s. 23). Section 24 of the Act of 1870, since repealed by s. 47 of the Act of 1881, provided for appeals from the Civil Bill Court to the Judge of Assize, and states that the judge hearing such appeal may give judgment affirming, reversing or modifying the order appealed from, and, if the judge alters or modifies the order, such order, so altered and modified, and signed by the judge, shall be of like effect as if it were an order of the Civil Bill Court. The effect of these sections is to show that the orders of the Civil Bill Court were of similar effect and enforceable in similar manner as ordinary civil bill decrees, and also that up to the passing of the Act of 1881 the order of the Judge of Assize on appeal in cases under the Land Act of 1870 had the same effect as the order of the Civil Bill Court under the same Act. Section 47 of the Land Act of 1881 repealed s. 24 of the Act of 1870 constituting the Judge of Assize as the tribunal of appeal, and

LAND
COMMISSION.
Feb., Mar.,
1908.

LAND
COMMISSION.
Feb., Mar.,
1908.

enacted that any person aggrieved by the decision of any Civil Bill Court, with respect to any matter under the Land Act of 1870, might appeal to the Land Commission, who could confirm, modify or reverse the decision of the Civil Bill Court. Section 48 (3) of the Act of 1881 provides that the Land Commission in respect of the following matters—that is to say : (a) enforcing the attendance of witnesses and production of documents, &c. ; (b) issuing any commission for the examination of witnesses ; (c) punishing for contempt of Court in the presence of the Land Commission ; (d) and making or enforcing any order whatever made by them for the purpose of carrying into effect the objects of this Act—shall have all such powers, rights and privileges as are vested in the Chancery Division of the High Court of Justice in Ireland for such or like purposes, and all proceedings before the Land Commission shall in law be deemed to be judicial proceedings before a Court of Record. The argument of the tenant is that the effect of these sections, and particularly of the words “ powers, rights and privileges as are vested in the Chancery Division,” is to make the decree of the Land Commission awarding compensation in this case the same as a decree of the Chancery Division, and as such to bear interest at 4 per cent. under the provisions of 3 & 4 Vict., c. 105, ss. 26 and 27. Section 26 enacts that every judgment debt therein mentioned shall carry interest at the rate of 4 per cent. per annum from the time of entering up

the judgment. And s. 27 provides that all decrees and orders of the Court of Chancery and of the Court of Exchequer at the Equity Side thereof, and all rules of any of the Superior Courts of Common Law, and all orders of the Lord Chancellor, or Master of the Rolls, or of the Court of Commissioners of Bankruptcy, or of the Lord Chancellor in Lunacy, whereby any sum of money shall be payable to any person, shall have the effect of judgments of a Superior Court of Common Law. It was admitted in argument that no ordinary decree of a Civil Bill Court in Ireland for an amount of money carries interest unless it is moved by *certiorari* into a Superior Court, and it also appears from the decision in 1880, in the case of *Gracey v. Harrison* (8 L. R. Ir. 20), that a decree for compensation under the Act of 1870 was such a judgment of the County Court within the meaning of s. 9 of 27 & 28 Vict., c. 99, as could be removed by *certiorari*, so as to give it the effect of a judgment of the High Court. The words of s. 48 of the Act of 1881, upon which the tenant relies, do not appear to me to have the effect which the tenant claims for them—namely, to make the order of the Land Commission of the same effect as an order of the Chancery Division—they merely seem to me to deal with the method of enforcement, such as attachment, or by receiver. In order to make the decree of the Land Commission carry interest I think you would have to read into the Act words that are not there, “and such order shall have the same

LAND
COMMISSION.
Feb., Mar.,
1908.

LAND
COMMISSION.

Feb., Mar.,
1908.

effect as if made by one of the judges of the High Court of Justice in Ireland." Also, according to the tenant's argument, the result would follow that a decree of the County Court would not bear interest, but the decree of the appellate Court, confirming the decree of the primary Court, would bear interest. Although I understood the tenant to base his claim for interest entirely on the words in s. 48, and the fact that a decree on appeal was made by the Land Commission, yet I think it right to say that the words of s. 23 of the Act of 1870, stating that an order made under the Act may be enforced by attachment or otherwise in the same manner as if it were the order of a Superior Court of Common Law, refer only to the mode of enforcement, and do not place the order of a Civil Bill Court in the same position as a judgment of a Superior Court so as to carry interest. It is also to be remarked that in England it has been decided by the Court of Appeal that a County Court judgment debt does not carry interest under 1 & 2 Vict., c. 110, s. 17 (*Reg. v. Essex*, 18 Q. B. D. 704). I do not say that this is in any way conclusive as to establishing that a County Court decree in Ireland does not carry interest as it was decided on the wording of different Acts, but so far as it goes it is an authority for upholding what I understood has always been the opinion in Ireland—namely, that a Civil Bill Court decree does not carry interest. On the whole, I am of opinion that the tenant has failed in his conten-

tion, and I must refuse the motion to issue execution with a claim for interest included, and the tenant must bear the costs of the motion.

LAND
COMMISSION.
Feb., Mar.,
1908.

Solicitor for the claimants : *J. K. Reid.*

Solicitors for the respondent : *H. C. M'Coy & Co.*

[*Note up on pp. 160 and 188 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of J. A. H. MOORE
BRABAZON.

LAND
COMMISSION.
May, 1908. May 18, 1908.—*Land Law Acts—Practice—
Irish Land Act, 1903—Section 15—Vesting order
—Amendment—Intervening interest—Claim for
compensation out of purchase-money—Estoppel.*

The tenant of a holding, of which portion was sublet to a sub-tenant for the life of the sub-tenant, entered into an agreement for the purchase of the entire holding under the provisions of the Irish Land Act, 1903. The Estates Commissioners having required that the sub-tenant should sign a purchase agreement in respect of that portion of the holding in his possession at a price fixed by them as the proportion of the purchase-money applicable thereto, and that the tenant should endorse his consent, this course was, after various negotiations, adopted, and the lands which had been sublet, and the residue of the holding, were vested in the sub-tenant and the tenant respectively. The Estates Commissioners had found as a fact that, in so carrying out the sales and vesting the lands, the vendor, the tenant, and the Estates Commissioners acted on the assumption that the right of the tenant to re-take possession of the lands in possession of the sub-tenant on the death of the latter would remain, notwithstanding the vesting

orders. Subsequently the tenant was advised that his right to possession on the death of the sub-tenant had been extinguished by the operation of the vesting order :

LAND
COMMISSIONER.
May, 1908.

Held, by the Judicial Commissioner (without expressing any opinion as to the effect of the vesting order on the tenant's alleged right to resume possession after the death of the sub-tenant), (1) that he had no jurisdiction to amend the vesting order by inserting a declaration of trust in favour of the tenant after the death of the sub-tenant, in the absence of an admission by the sub-tenant that this had been intended, and (2) that the tenant was precluded from claiming compensation out of the purchase-money under s. 15 (2), as the sale had been carried out on the basis that the right of reverter was not to be redeemed.

The provisions of s. 15 and the powers of the Estates Commissioners with regard to intervening interests explained.

Questions submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The facts sufficiently appear from the judgment.

Clancy, K.C., and Philip White for the tenant, R. J. Heenay.

M^cGusty for the sub-tenant, E. P. Heenay.

Chaytor, K.C., and Gerald FitzGibbon for the vendor.

E. S. Murphy for a mortgagee.

Cur. adv. vult.

LAND
COMMISSION.
May, 1908.

WYLIE, J.—In this case the vendor, in Dec., 1904, lodged an originating application for the sale of an estate, including, amongst others, a holding of which R. J. Heenay was tenant, and which, by an agreement of Dec. 2, 1904, he had agreed to purchase under the Land Purchase Acts for the sum of £3,962. The holding contained 172a. 1r., and was held at a judicial rent of £179 15s. 6d. A portion of this holding, containing about 29a. Or. 20p., had been demised by R. J. Heenay to his brother, E. P. Heenay, in 1876, for ten years, at a rent of £75. In 1887, after some dispute between the brothers, a new lease was made of the same 29a. Or. 20p., at £32 10s. a year, for the life of E. P. Heenay. This lease was specially settled by senior counsel, containing a proviso showing that the letting was for temporary convenience, and entitling the lessor to resume possession on the death of his brother. This sub-tenancy was set out in the schedule to the agreement for purchase signed by R. J. Heenay, and the effect of the proviso was stated in said schedule. But, notwithstanding this, the Estates Commissioners, on April 26, 1906, issued a query to the solicitors for the vendor in the following terms:—"The Commissioners are informed that Lot 34 is sublet to E. P. Heenay, he should sign an agreement at £860, tenant to endorse his consent." It would seem from this as if the Commissioners had received their information as to this sub-tenancy from their inspector, who had fixed £860 as the proportion of the purchase-money applicable to

the portion of the holding sublet, and that they had not read or had overlooked the schedule to R. J. Heenay's purchase agreement. The Commissioners state that they required R. J. Heenay to endorse his consent on the agreement to be signed by E. P. Heenay, because, without such consent, there is nothing in s. 15 of the Act of 1903 which enables them to insist on said R. J. Heenay purchasing the residue of the holding not included in the sub-tenancy, and in this, I think, they are clearly right. The object and effect of s. 15 seems to me to be perfectly clear. It gives the Commissioners power, if they think fit, to put a sub-tenant in a position to buy from the head landlord, by declaring him to be the tenant of the parcel of land which he occupies as sub-tenant, and that parcel of land to be a holding so as to make the Land Purchase Acts apply to them; and this, it seems to me, they can do without the consent of the middleman and without regard to whether the middleman has sublet his own entire holding or only a part of it. If the entire of the middleman's holding has been sublet, and the head landlord, pursuant to such declaration under s. 15 and without the consent of the middleman, sells the fee to the sub-tenant, then the Land Commission, under s. 15 (2), must redeem the intervening interest of the middleman, and the redemption price fixed by the Estates Commissioners must be paid out of the purchase-money. If only a portion of the middleman's holding is sublet, and the head landlord sells to the sub-tenant pursuant to such declaration,

LAND
COMMISSION.
May, 1908.

LAND
COMMISSION.
May, 1908.

and without the consent of the middleman, in this case also the Land Commission must redeem the intervening interest, and the redemption price must be paid out of the purchase-money, and it is immaterial whether the middleman has purchased the residue of his holding or not. If he refuse to purchase the residue it may, with the consent of the vendor, be excluded from the estate. In both of these cases the sale to the sub-tenant is entirely independent of the middleman, and any intervening interest he has been deprived of the vendor's purchase-money must pay for, and the vendor, knowing this, will bear it in mind when fixing the price with the sub-tenant. If the price is fixed on the basis of the rent which the sub-tenant pays to the middleman, where it exceeds the rent which the middleman pays for the same parcel to the vendor, it is obvious that the purchase-money includes the value of the intervening interest, and, therefore, ought to compensate the middleman for its loss, if the sub-tenant's rent does not exceed the rent paid by the middleman for the same parcel of land to the vendor, the intervening interest has no value, and will be declared extinguished under s. 15 (2). Where, however, the vendor has agreed to sell to his tenant his entire holding at a fixed price, and such tenant has a portion sublet with the consent of the landlord, the Estates Commissioners can adopt one or other of three courses: (1) they may sanction the sale, subject to the sub-tenancy; (2) they may, with the consent of all parties, sanction the advance

and apportion it between the tenant and the sub-tenant, making the declaration under s. 15 (1), and vesting in the tenant and sub-tenant the fee of the portions in their respective occupation ; or (3) if the parties cannot come to any agreement whereby the sale can be carried out, as in No. 2, the Estates Commissioners can refuse to sanction the sale, and, with the consent of the vendor, exclude the tenant's holding from the estate. Once the price at which the vendor has agreed to sell his entire interest in the holding is fixed, it is immaterial to him how it is apportioned between the tenant and sub-tenant. Now, the course which the Estates Commissioners in this case at first endeavoured to carry out was course No. 2, and by their query of April 26, 1906, they called upon the vendor's solicitors to obtain the consent of all parties. Accordingly, on May 1, 1906, an agreement for purchase by the sub-tenant, E. P. Heenay, of his portion at £860 was signed by him and the vendor, subject to the consent of R. J. Heenay. R. J. Heenay refused to consent, except on the terms that the fee-simple of the sub-tenant's portion should, on the sub-tenant's death, revert to him. On July 2, 1906, R. J. Heenay wrote to the Estates Commissioners referring to what he called "the equitable deed of life lease" that had been forwarded, and stating "that he had no objection to the sub-tenant-for-life buying out his holding, but on the basis of the deed of 1887, now in your hands, by that the property reverts to me or my sons." On July 13, 1906, the vendor's

LAND
COMMISSION.
May, 1908.

LAND
COMMISSION.
May, 1908.

solicitors wrote to E. P. Heenay's solicitor, stating, "the Estates Commissioners have intimated that they have decided to exclude R. J. Heenay's holding from the sale of the estate until a settlement is come to as to your client's sub-tenancy. The effect of the Estates Commissioners' decision is that matters will go on as before, and both parties will be deprived of the benefits of the Act. We have written to Mr. R. J. Heenay explaining how matters stand, and he has written to us to say that he is willing that your client should buy his sub-tenancy, provided that it is agreed that on your client's death the holding shall pass and become the property of R. J. Heenay. We shall be glad if you will put this before your client and obtain his instructions, and let us hear from you at an early date." On July 27, 1906, E. P. Heenay's solicitor replied :—"I am in receipt of your favour of the 26th inst. I explained the terms of your letter of the 13th inst. to Mr. E. P. Heenay, and he did not seem willing to fall in with Mr. R. J. Heenay's suggestion. The matter stands thus, as, although I have written to Mr. E. P. Heenay, he has not called to see me since." The parties having failed to agree, the Estates Commissioners, on July 26, 1906, adopted the third course referred to, and declared the "estate," excluding therefrom the entire holding of R. J. Heenay. Whatever may have happened in the meantime, on Aug. 14, 1906, R. J. Heenay signed the following consent :—"I, R. J. Heenay, hereby agree and consent to the portion of my

holding held by E. P. Heenay, as my sub-tenant, being vested in him pursuant to the provisions of the Irish Land Act, 1903." The consents required having thus been given, the Estates Commissioners reverted to course No. 2 above mentioned, and on Feb. 28, 1907, declared R. J. Heenay's holding fit to be regarded as a "separate estate," and made the declaration under s. 15 (1) deeming the sub-tenant to be tenant of a holding. On the same day the advance of £860 was made to E. P. Heenay, and his portion of the holding was vested in him, and £3,102, balance of the original purchase-money, was advanced to R. J. Heenay, and the residue of the holding was vested in him. The Estates Commissioners find as a fact, of which, on the evidence, there can be no doubt, that in so carrying out the sales and vesting the lands the vendor, R. J. Heenay, and the Estates Commissioners, all acted on the assumption that the right of the said R. J. Heenay to retake possession of E. P. Heenay's portion on the death of the latter would remain, notwithstanding said vesting orders. Since then it would appear that R. J. Heenay has been advised that that assumption was erroneous, and that his right to the possession on E. P. Heenay's death is extinguished, and he has accordingly applied to the Estates Commissioners to assess the value of this right under s. 15 (2) as an intervening interest, and claims that such value, when fixed, is payable out of the purchase-money. In view of this application and claim, the Estates Commissioners have submitted to me a number of

LAND
COMMISSION.
May, 1908.

LAND
COMMISSION.
May, 1908.

questions of law for my decision. Pending the argument on the case submitted, the vendor served a notice of motion to amend or rectify E. P. Heenay's vesting order by inserting therein something in the nature of a declaration of trust for himself for life, and after his death for R. J. Heenay in fee. If E. P. Heenay admitted that that was what was intended to be done, I would have no hesitation in making the amendment, but, in the absence of such an admission, I have, in my opinion, no jurisdiction to make such an order. That must be done, if at all, in a Chancery action. I, therefore, refuse to amend the vesting order, and I express no opinion whatever as to its effect upon R. J. Heenay's alleged right to resume possession on E. P. Heenay's death. Disposing thus of the motion I come to the questions submitted by the Estates Commissioners. The first question is—Whether the vendor is precluded from contending that s. 15 cannot be applied to this case? I take it the question refers to s. 15 (2), and in that sense I have no hesitation in answering "no." Though the question has not been asked, I am equally clear that R. J. Heenay is precluded by the facts and circumstances of the case from contending that any compensation is payable to him out of the purchase-money in respect of the right of reverter on the death of E. P. Heenay claimed by him and supposed to be lost. If there is one thing clear in the case it is this, that everything that has been done with reference to the portion of his holding comprised in the sub-tenancy,

has been done with his consent, and on the basis that the right of reverter claimed by him was not to be redeemed, but was to remain as before, and, if it was not to be redeemed, s. 15 (2) cannot apply. This also answers the second question in the negative, and this answer renders it unnecessary to answer the remaining questions. Now, let us look at the case for a moment apart from this question of estoppel. By his original agreement R. J. Heenay agreed to purchase his entire holding for £3,962, or, in round numbers, twenty-two years' purchase of his rent. E. P. Heenay has purchased the portion comprised in his sub-tenancy at £860, or about twenty-six and a half years' purchase of the rent of £32 10s., which he paid to R. J. Heenay, and the effect of this is that R. J. Heenay has been enabled to purchase the residue of his holding at £3,102, or about twenty years' purchase of the balance of his rent, and thereby that balance of rent of £147 10s. is reduced to a purchase annuity of £101, or over 31 per cent.; so that if E. P. Heenay's sub-tenancy had been of the same permanent character as the tenancy of R. J. Heenay, giving him the same right of purchase under the Act, R. J. Heenay gained by the way in which these sales were carried to the extent of £295, or two years' purchase of the balance of his rent after deducting the £32 10s. But, assuming now that E. P. Heenay's sub-tenancy was to cease at his death, what was the position of R. J. Heenay? His intervening interest during his brother's life would be measured by the amount by which the

LAND
COMMISSION.
May, 1908.

LAND
COMMISSION.
May, 1908.

£32 10s. rent, paid by the brother, exceeded the fair proportion of his own rent which issued out of the land comprised in the sub-tenancy ; but, according to R. J. Heenay's own admissions, the sub-tenancy comprised by far the best part of his holding, and this is confirmed by the inspector's valuation at £860, or twenty-six and a half years' purchase of the £32 10s. It is clear, therefore, that the £32 10s., instead of exceeding, was below the fair proportion of R. J. Heenay's rent, and therefore his intervening interest during his brother's life was of no value whatever. Now, after the death of E. P. Heenay, as the sub-tenancy would have lapsed, there would be no intervening interest. You cannot have an intervening interest without a middle interest and a sub-interest, and therefore whatever name you may give to the right to take possession as against E. P. Heenay and his representatives at E. P. Heenay's death, it does not seem to me to be an intervening interest within s. 15 (2). I do not mean at present to decide that, as it was not argued, but that is my present impression, and, if I am right in that, it would also be a bar to R. J. Heenay's claim against the purchase-money.

Solicitors : *Molloy & Molloy ; Hayes & Sons ; Stanuall & Co. ; Reeves & Son.*

[*Note up on p. 1073 of Cherry's Irish Land Act, 1903.*]

IRISH LAND REPORTS.

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of the MARQUIS OF
CLANRICARDE (No. 1).

Feb. 5, 11, 1908.—*Evicted Tenants (Ireland)* LAND
COMMISSION.
Act, 1907—Questions of law arising under—
Submission to Judicial Commissioner under s. 23 Feb., 1908.
of the Irish Land Act, 1903—Application to
transfer to High Court under s. 71—Right of appeal.

Where important questions of law arising under the Evicted Tenants (Ireland) Act, 1907, were submitted for the decision of the Judicial Commissioner under s. 23 (1) of the Act of 1903, on an application that the questions be transferred to the High Court under the provisions of s. 71 :

Held, that the application should be refused on the grounds (1) that it was the intention of the Legislature that all questions of law arising before the Estates Commissioners should, as a general rule, be decided by the Judicial Commissioner ; and (2) that the provisions of the Evicted Tenants Act

LAND
COMMISSION.
Feb., 1908.

indicate that the Legislature intended that all questions arising thereunder should come to a speedy and final decision.

Quare, would an ultimate appeal to the House of Lords lie if the case had been transferred under s. 71 ?

Application to transfer to the King's Bench Division certain questions of law submitted by the Estates Commissioners relating to the proposed acquisition by them under the provisions of the Evicted Tenants Act, 1907, of lands in the occupation of George Cottenham, a new tenant within the meaning of the Act.

Serjeant O'Connor, K.C., Meredith, K.C., and Wylie, for the Estates Commissioners, cited Lansdowne's Estate (No. 1), II. Quart. Land Reps. 71, and objected to the proposed transfer on the ground that great delay would be caused thereby.

Jellett, K.C., Conner, K.C., and Hynes for Lord Clanricarde.—The case has been submitted under s. 23 (1) of the Act of 1903. We ask that it be transferred to the King's Bench Division under the provisions of s. 71. The only reason for the application is that if the case is not transferred the general opinion is that no appeal to the House of Lords would lie from the Court of Appeal. Undoubtedly the Court has full discretion to transfer, and if this is done our right to appeal to the House of Lords is clear.

[*Ronan, K.C.*—There is no appeal to the House of Lords from final orders, unless in cases where

error would have lain prior to the Judicature Act.]

LAND
COMMISSION.

Feb., 1908.

The argument of the other side involves this, that if transferred to the King's Bench Division an appeal would not lie, but if transferred to the Chancery Division an appeal would lie. Section 71 gives power to transfer to any division or judge of the High Court. The appeal, if anything at all, is an appeal from the Court in which the case is decided. If it were transferred to a Court from which a right of appeal exists, could it be argued that, because the orders of another division are not appealable, no appeal would lie? If there is power to transfer to a Court from which an appeal would lie, then if the case is transferred to the King's Bench Division it could be argued that an appeal would lie, because the right to appeal exists in the Chancery Division. It is sought to introduce into s. 71 the words "except final orders in which error lay before the Judicature Act."

Ronan, K.C., and *Muldoon* for George Cottenham, the new tenant, and two evicted tenants.—The right of appeal to the House of Lords does not depend on whether the order is final or not, but whether error would lie: Judicature Act (Ireland), 1877, s. 86; Appellate Jurisdiction Act, 1876, s. 12. There was an appeal to the House of Lords from orders of the Common Law Courts only where there was error on the record. In *Gosford v. Irish Land Commission*, [1899] A. C. 435, this question was fully argued; there

LAND
COMMISSION.
Feb., 1908.

was a final order in that case, but the House of Lords held that no appeal lay. The question is whether there was an appeal to the Exchequer Chamber in a like case prior to the Judicature Act. All that s. 71 of the Act of 1903 gives is the same right of appeal as from a *final* order of the High Court; but as an appeal lay to the House of Lords from every order of the Court of Chancery, final or otherwise, clearly appellate jurisdiction was not contemplated by the section. The mere fact that an order is a final order does not give a right of appeal to the House of Lords, nor is it possible to spell such a right of appeal out of s. 86 of the Judicature Act, because only writs of error could reach the Exchequer Chamber: *Reg. v. Barton and others*, [1902] A. C. 268. This is a case which, moreover, could never have reached either the Court of Appeal in Chancery or the Exchequer Chamber, because this tribunal was not in existence prior to the Judicature Act. Appeal to the Court of Appeal lies, because the Judicature Act gives that right of appeal from all orders, but if any case could not have gone to the Court of Appeal in Chancery or the Exchequer Chamber before the Act it cannot go to the House of Lords. Therefore, quite apart from the undesirability of delaying the matter, there is no ground for granting this application.

WYLLIE, J.—I have had an opportunity of

considering this case, and I have made up my mind not to transfer it. The Estates Commissioners, under s. 23 (1) of the Act of 1903, have stated a case to me raising a question of law arising under s. 2 of the Evicted Tenants Act, and that question simply is—What is the true construction of s. 1 (3) of that Act? This is a very narrow question; it may be difficult, but, at all events, it is limited to four lines of an Act of Parliament, and in that state of things Lord Clanricarde served a notice of motion asking me to transfer the questions to the High Court, and the grounds for his application are that this case is of vast importance, and that if transferred an appeal will lie to the Court of Appeal and afterwards to the House of Lords, whereas if it is not transferred there will be an appeal to the Court of Appeal only. The question as to whether an appeal to the House of Lords would lie if the case were transferred has been discussed to-day. I think that is probably a more difficult question than those submitted to me, but it does not appear to me that it ought to affect my decision on this motion. It has been suggested that there are no cases proper to be transferred under s. 71 if this is not one, but it occurs to me that there are many. There might be questions in which the Land Commission were involved which ought not to be decided by the Judicial Commissioner, but which it would be proper to refer to an independent tribunal. It is quite clear to me that the Legislature, in passing the

LAND
COMMISSION.

Feb., 1908.

LAND
COMMISSION.

Feb., 1908.

Act of 1903, intended that, as a general rule, all questions of law arising under the Act of 1903 should be determined by the Judicial Commissioner, subject, of course, to an appeal to the Court of Appeal. Also, on referring to the Evicted Tenants Act an even stronger ground against Mr. Jellett's argument is to be derived from s. 2 (12). If the Estates Commissioners in this case had taken the bolder course of determining the question themselves, and had decided the case against Lord Clanricarde, the only appeal he could take would be to a judge of the High Court, and under s. 12 the decision of that single judge would be final. Therefore the Evicted Tenants Act shows that if the Estates Commissioners had taken the course which they were entitled to take, of dealing with these questions themselves, Lord Clanricarde would have no power to appeal even to the Court of Appeal. It seems to me that the Legislature intended that all questions of law and fact arising under the Act should come to a speedy and final decision, and although this is a matter of importance to Lord Clanricarde, it is also a matter of great importance not only to the evicted tenants, but to the new tenants who occupy so many holdings on this estate, and who have signed agreements to sell, to know how they stand, because if this case were delayed by an appeal to the House of Lords these new tenants would be in a state of suspended animation, and possibly would not till their holdings, while the

evicted tenants would also be kept in a state of suspense. Every argument is in favour of having this case speedily decided, and on these grounds I think I should not yield to the application to transfer, but should myself decide the questions submitted to me.

LAND
COMMISSION.
—
Feb., 1908.

Ronan asked for costs of the motion.

WYLLIE, J. — Both the evicted tenants and the new tenants were vitally interested in this motion and I can not see any reason why the costs should not follow the event.

Solicitor for Lord Clanricarde : *H. Davidson.*

Solicitor for the tenants : *V. Kilbride.*

Solicitor for the Estates Commissioners :
William Alexander.

[*Note up on p. 1138 of Cherry's Irish Land Act, 1903.*]

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, BART, L.C., FITZGIBBON
and HOLMES, L.JJ.)

In the Matter of the Estate of the MARQUIS OF
CLANRICARDE (No. 2).

APPEAL.
May, 1908.

May 8, 11, 18, 1908.—*Evicted Tenants (Ir.)
Act, 1907—Land in occupation of new tenants—
Compulsory acquisition by Estates Commissioners—
Consent of new tenant.*

The Estates Commissioners proposed to acquire compulsorily from the landlord, for the accommodation of evicted tenants, lands in the occupation of a new tenant, who was admittedly "a bona fide tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry," and submitted that, notwithstanding the prohibition contained in s. 1 (3) of the Evicted Tenants Act, they were entitled to acquire such lands compulsorily where there was a consent by the person in occupation to surrender his interest on payment, as compensation, of a sum which had been agreed upon :

Held (reversing WYLIE, J.), that the prohibition in the section could not be got rid of by obtaining

the consent of the new tenant, and that therefore the Estates Commissioners were debarred from acquiring compulsorily the lands in question.

APPEAL.
May, 1908.

Questions of law arising under the Evicted Tenants (Ir.) Act, 1907, submitted by the Estates Commissioners, under s. 23 (1) of the Irish Land Act, 1903, for the opinion of the Judicial Commissioner. Part of the lands of Capparsallagh, in the possession of George Cottenham, as tenant to the Marquis of Clanricarde, had been formerly occupied by an evicted tenant or tenants, to which the Evicted Tenants (Ir.) Act, 1907, applied. The said George Cottenham was a *bona fide* tenant using or cultivating the said lands in accordance with proper methods of husbandry. The Estates Commissioners considered it expedient to acquire the said lands for the purposes of the Act, and the said George Cottenham had signed a document requesting the Estates Commissioners to take steps to acquire the lands, and agreeing in the event of their doing so to accept the sum of £220 for the purchase of the tenant's interest, and to execute any documents which might be necessary for the extinguishment of or transfer of the said tenant's interest to the Estates Commissioners, or such person or persons as they might direct. The Estates Commissioners proposed to restore thereto certain tenants evicted from the estate, but it had not been determined whether, if the lands were acquired, it would be possible or

APPEAL.
May, 1908.

expedient to reinstate in the said lands the actual tenant or tenants evicted therefrom. The Estates Commissioners having published in the *Gazette* the prescribed notice of their intention to acquire the lands, the Marquis of Clanricarde lodged an objection to the proposed acquisition upon several grounds, of which the following are two :—(a) That the lands were tenanted lands in the occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry ; (b) that it was proposed that persons other than the evicted tenants thereof should be placed in possession of the lands. Under these circumstances the Estates Commissioners submitted the following questions of law :—(1) Are the Estates Commissioners debarred from acquiring the said lands under the provisions of the Evicted Tenants Act, on the ground that the lands are tenanted lands and in the possession or occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry ? (2) Can the Estates Commissioners only acquire the said lands compulsorily for the purpose of reinstating the actual tenant or tenants formerly evicted therefrom ? (3) If the Estates Commissioners are not debarred from acquiring the said lands, and do acquire them, are they entitled to pay the said sum of £220 out of the reserve fund ?

Jellett, K.C., Conner, K.C., and Hynes for the Marquis of Clanricarde (the appellant).

Mr. Serjeant O'Connor, Meredith, K.C., and Wylie
for the Estates Commissioners.

APPEAL.
May, 1908.

H. Wilson, K.C., and Muldoon for the "new tenant" and two evicted tenants.

Cur. adv. vult.

SIR SAMUEL WALKER, BART., L.C., said the object and express intention of the Estates Commissioners were to acquire compulsorily from Lord Clanricarde the lands in Cottenham's tenancy, and they proceeded to accomplish that object by purchasing, by agreement, his interest as tenant from Cottenham. It was stated, and would seem to be the fact, that there were other lands similarly situated to those concerned in the present case, and the Estates Commissioners required guidance for the purpose of acquiring lands compulsorily in such cases. Cottenham was a new tenant to whom the Evicted Tenants Act applied, and the lands were in the occupation and possession of a *bona fide* tenant using and cultivating the same as an ordinary farmer in accordance with proper methods of husbandry. Section 1 of the Act enabled the Estates Commissioners to acquire lands compulsorily for the accommodation of (a) evicted tenants coming within certain descriptions, and (b) new tenants. Of course, when new tenants were in possession the lands were tenanted, and the Act said no tenanted land should be acquired compulsorily unless it was in the occupation of a new tenant to whom the Act applied. It appeared to the

APPEAL.
May, 1908.

Court impossible to hold that if the land was in the possession of an old tenant this prohibition could be got rid of by any consent on the part of the old tenant. There was the further proviso in s. 1 (3) that no tenanted land should be acquired compulsorily which was in the possession or occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry. It was part of the case that such circumstances existed here, and the only way in which it was sought to get rid of the prohibition was that the tenant was willing not to raise the question and to sell his holding to the Estates Commissioners. It was a matter in which both Lord Clanricarde and the State, which paid the money, had, he thought, sufficient interest to put forward the prohibition. That Court was bound to follow the Act of Parliament, and had no right to consider why or how, or supported by what speeches, the Act came to assume its present shape. In the result they were bound to answer the first question in the affirmative, and, having regard to their answer to that question, answers to Nos. 2 and 3 seemed unnecessary.

FITZGIBBON, L.J., said that the object of the Evicted Tenants Act was to give to the Estates Commissioners new powers of acquiring lands on which to restore evicted tenants to the status of tenants within the provisions of the Land Purchase Acts, either by reinstating them as purchasers of the lands which were formerly

their own or by acquiring other lands of which to give them possession when required for that purpose. The acquisition of untenanted land was dealt with entirely by s. 7 of the Act. The effect of s. 1 (3), so far as the compulsory acquisition of tenanted land was concerned, was that no tenanted land could be acquired compulsorily except such as was in the occupation of new tenants who were not ordinary farmers using or cultivating the same in accordance with proper methods of husbandry. It appeared to him perfectly plain that the policy of the Act was that the land was to be acquired for the purpose of extending the area of tenanted land in Ireland by restoring the evicted tenants to holdings of which they might become, or might hope to become, *bona fide* tenants, who would use or cultivate the same as ordinary farmers in accordance with proper methods of husbandry; but that that land was not to be acquired at the expense of the very same class that it was desired to establish. It was suggested that this was a provision for the benefit or protection of the occupiers. The State was interested in extending the area that was in the occupation of *bona fide* tenants, that is ordinary farmers; the landlords were interested in the same thing; the Treasury were interested because they had to supply the money; and that that was no trifling matter was indicated by the fact disclosed in affidavits that some of these tenants, who, if the Act was followed, would be put

APPEAL.

May, 1908.

APPEAL out, should be paid twenty-five years' purchase of the rent of their holdings. But lastly, May, 1908. the class of tenants themselves were interested, because they were *bona fide* tenants. Such persons were not by a side wind to be got rid of by answering such questions as those submitted in words which were categorically a flat contradiction of the words of the Act of Parliament.

HOLMES, L. J., delivered a concurring judgment.

Solicitor for the appellant : *Hutchinson Davidson*.

Solicitor for the tenants : *Valentine Kilbride*.

Solicitor for the Estates Commissioners : *William Alexander*.

[*Note up on p. 1117 of Cherry's Irish Land Act, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZ-
GIBBON, and HOLMES, L.JJ.)

FORTE v. WRIGHT.

Nov. 20, 1908.—*Town Tenants (Ireland) Act, 1906*—*Tenancy for "a year certain" to be determined by either party serving one month's notice—Rent payable monthly.* APPEAL.
Nov., 1908.

Where the terms of a tenancy were that the tenant should hold for one year certain, from Feb. 1, 1907, to be determined by either party serving one month's notice previous to Feb. 1, 1908, and in the event of said notice not being given, and the tenant remaining in possession, the tenancy could be determined by either party giving a month's notice previously to the first of any month, the rent to be payable monthly at the rate of £65 per annum :

Held, on an application for compensation under the Town Tenants (Ireland) Act, 1906, that the tenant was not entitled to claim under the Act, inasmuch as the tenancy was a monthly tenancy, and accordingly was not within the purview of the Act.

Appeal from an order of Dr. Andrew Todd, K.C., sitting for the Recorder of Belfast, dated July 7, 1908, dismissing an application for

APPEAL.
Nov., 1908. compensation for improvements and disturbance under the Town Tenants (Ireland) Act, 1906. The applicant, a confectioner and ice cream vendor, was tenant of premises in Belfast under an agreement in writing dated Dec. 28, 1906. The terms of the tenancy were that the tenant should hold for one year certain from Feb. 1, 1907, the tenancy to be determined by either party serving one month's notice previously to Feb. 1, 1908, and in the event of such notice not being given, and the tenant remaining in possession, the tenancy could be determined by either party giving a month's notice previously to the first of any month, the rent to be payable monthly at the rate of £65 per annum. Notice to quit was served on Jan. 19, 1908. Dr. Todd, K.C., dismissed the application on the ground that the tenancy was not one to which the Act applied. The applicant appealed.

Whitaker, K.C., and *Porter* (with whom was *T. J. Campbell*), for the appellant, cited *Wright v. Tracey*, Ir. R. 7 C. L. 134; *In re Trelfall*, 16 Ch. Div. 274; *King v. Eversfield*, [1897] 2 Q. B. 475.

Hanna, for the respondent, was not called on.

SIR S. WALKER, BART., L.C.—The tenant in this case is not entitled to claim under the Act. The point is, what was the character of the tenancy when he made his claim? The tenant when he made his claim was a monthly tenant; the rent reserved is not a yearly rent, but at the

rate of £65 a year ; it is made payable monthly, and all the provisions as to terminating the tenancy are those applicable to a monthly tenancy. Under these circumstances it is impossible to say that it falls within the definition in s. 18. In our opinion he has not the status to make the claim, and the appeal must be dismissed with costs.

APPEAL.
Nov., 1908.

FITZGIBBON, L.J.—I concur. In almost every agreement to be construed as a yearly tenancy the words “yearly” or “from year to year” occur, but in the present case the words are “year certain” for the first year, and after that the words and terms in the contract are applicable to a tenancy entirely monthly. There is nothing illegal in limiting a contract of tenancy in such a way as this even though it has the effect of evading the Act. Once the year certain was up a monthly tenancy commenced.

HOLMES, L.J.—I concur.

Solicitor for the appellant : *W. Tughan.*

Solicitor for the respondent : *D. M'Gonigal.*

[*Note up on pp. 7, 207, and 220 of Cherry and Wakeley's Land Acts, 3rd Edition, 1903.*]

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

(Before MADDEN, BOYD and DODD, JJ.)

BELL v. ARCHBOLD.

KING'S
BENCH.

May, 1907.

May 8, 15, 1907.—*Land Law Acts—Lease—Deposit applicable to discharge of rent of last year of term—Payment of interest on deposit—Effect of fair rent being fixed—Covenants running with the land.*

A. made a lease to B. for a term of sixty-one years, from Nov. 1, 1872, at a rent of £200 a year, which lease contained a covenant by which, after reciting that the lessee had deposited a sum of £200 as security for the payment of the rent and performance of the covenants in the lease, which sum was to be allowed in liquidation of the rent last accruing before the determination of the term (the covenants being duly performed) the lessor covenanted with the lessee that he would "pay to or allow out of the rent hereby covenanted to be paid by the said B., his executors, administrators or assigns, interest during the continuance of this demise upon the said sum of £200 at the rate of 5 per cent. per annum." On March 1, 1888, a fair rent was fixed on the application of the tenant under s. 1 of the Act of 1887 at the sum of £145. On Dec. 17, 1902, the rent was further reduced to £91 3s., which on appeal was, on June 1, 1905, increased to £111. That order stated on its face

that no allowance was made in respect of the above-mentioned covenant. The interest of A. having devolved on C., and the interest of B. on D., and D. claiming to make the same annual deduction of £10 out of the judicial rent :

KING'S
BENCH.
May, 1907.

Held, that the covenant was a covenant running with the land, and not a merely collateral covenant.

Held also, that on the authority of Borrowes v. Delany, 24 L. R. Ir. 503, the covenant as to the deposit of the £200 was applicable to the yearly tenancy which sprang up on the fixing of the fair rent, and that the £200 still remained as security for the payment of the judicial rent, and that consequently the landlord was still bound to allow the sum of £10 each year out of the reduced judicial rent.

Held also, that the Land Commission was right in refusing to take into consideration the above-mentioned covenant in fixing the fair rent, for, though the covenant ran with the land, it was collateral with the rent of the holding as regards the Irish Land Acts :

Held also, that the case was distinguishable from Nettles v. Murphy, 30 L. R. Ir. 564.

New trial motion. The action was brought by Agnes Bell, a person of unsound mind, and the committee of her estate, for the recovery of a sum of £160 12s. 6d., rent accrued due out of certain lands in the County of Antrim from Nov. 1, 1902, up to and including the gale due May 1, 1906 (after certain credits). The lands were held by John Archbold, the predecessor in

KING'S
BENCH.
May, 1907.

title of the defendant, under a lease dated Feb. 27, 1873, from William Bell to him, for a term of sixty-one years, from Nov. 1, 1872, at the yearly rent of £200. This lease contained (*inter alia*) covenants on the part of the lessee for cultivation of the lands in good and husband-like manner, to keep and deliver up the premises in good repair, not to assign or sublet, and also the following recital and covenant:—"And whereas the said John Archbold has deposited with the said William Bell, at the time of the execution hereof, a sum of £200, as security for the due payment of the rent hereby reserved and the performance of the covenants herein contained, and which it has been agreed shall be allowed to the said John Archbold, his executors, administrators or assigns (if permitted to assign), in liquidation of the rent of the premises hereby demised last accruing before the determination of said term, provided the several clauses and covenants in these presents contained shall have been, up to the surrender of the premises hereby demised, faithfully observed and performed, he, the said William Bell, doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said John Archbold, his executors, administrators and assigns, that he, the said William Bell, his heirs, executors, administrators and assigns, shall or will pay to or allow out of the rent hereby covenanted to be paid by the said John Archbold, his executors, administrators or assigns, interest during the

continuance of this demise upon the sum of £200 at the rate of 5 per cent. per annum from the date of these presents, and at the end of said term or other sooner determination of this demise shall and will apply and set-off the said sum of £200 in liquidation and discharge of the previous year's rent hereby reserved of the premises hereby demised: Provided that the several clauses and covenants shall have been faithfully observed and performed." By an order of the Irish Land Commission, dated March 1, 1888, made upon the application of the said John Archbold, the fair rent of the holding was fixed at the annual rent of £145, pursuant to s. 1 of the Irish Land Act, 1887. By an order of the Irish Land Commission, dated Dec. 17, 1902, the said rent of £145 was, on the application of the defendant, Mary Archbold, who had succeeded to the estate of the said John Archbold, further reduced to the sum of £91 3s. That order was appealed from, and by further order of the Land Commission of June 1, 1905, the said rent of £91 3s. was increased to £111. The last-mentioned order contains the following declaration:—"And the Court doth declare that in fixing the fair rent as aforesaid no allowance has been made to the tenant in respect of the sum of £200 mentioned in the lease of Feb. 27, 1873, and the Court doth further declare that this order is made without prejudice to the rights (if any) of the tenant in respect of the aforesaid sum of £200 under the covenant in the said lease contained or otherwise."

KING'S
BENCH.

May, 1907.

KING'S
BENCH.

May, 1907.

The defendant in his defence claimed three and a half years' interest on the aforesaid sum of £200, from Nov. 1, 1902, amounting to the sum of £35, and brought into Court, on a plea of tender, the balance of the plaintiff's claim, amounting to the sum of £125 12s. 6d. He also pleaded a set-off of the £200 so deposited as aforesaid, but this claim was abandoned at the trial. The action was tried before Kenny, J., without a jury. The facts were not in dispute, and no witnesses were examined. The only question was as to the defendant's right to set-off the aforesaid sum of £35. It was admitted that it had been allowed up to Nov., 1902, and it appeared sufficiently from a correspondence which was given in evidence that all payments of rent made since that date, without deducting the interest on the £200, were so made under protest. It was also admitted that the plaintiff, Agnes Bell, was tenant-for-life of the landlord's estate under the will of William Bell, who died in the year 1879. The plaintiff contended that the covenant to allow the interest was a mere collateral one that did not run with the land and did not bind an assignee of the landlord's estate, that it was in no sense an incident of the holding, inasmuch as if it were the Land Commission would have taken it into consideration in fixing the fair rent. Kenny, J., in the course of a long judgment, stated:—"I am unable to distinguish the principle on which *Nettles v. Murphy*, 30 L. R. Ir. 564, was decided from that on which I am asked

to determine the question that arises in the present action in favour of the landlord. In each case, if it were one between original lessor and lessee, the latter, had the Act of 1887 not been in existence, would unquestionably have been entitled to the allowance out of the reserved rent. But the latter rent has disappeared altogether, and a new and wholly different rent has been created by statute in substitution for it. Moreover, that new rent is not the subject-matter of a specialty contract, such as the former rent was: *Carrickfergus U. D. C. v. Martin*, XI. Quart. Land Reps., 149; so that there are several elements to distinguish that which is alleged to be subject to the allowance from the former rent which contractually was so subject. As I have said, I consider that *Nettles v. Murphy* is a binding authority on me. The judgment was that of a learned judge who was a member of the Court in *Borrowes v. Delaney*, and who, in the month preceding his decision in *Nettles v. Murphy*, had considered a somewhat analogous question in *Pakenham v. Williamson*, 30 L. R. Ir. 292, and under whose notice the cases of *O'Connor v. Smith*, 20 L. R. Ir. 393; *Sturges v. Ryan*, 24 L. R. Ir. 305; and *Wilson v. Smyth*, 23 Ir. L. T. R. 7; had been distinctly brought. . . . I therefore hold that the defendant is not entitled to this allowance of £35, and that the plaintiff is entitled to judgment."

Henry, K.C., and *H. M. Thompson* for the plaintiffs.—Covenant to pay interest does not

KING'S
BENCH.

May, 1907.

KING'S
BENCH

May, 1907.

run with the land. Plaintiff is not assignee of deposit: *Spencer's Case*, 3rd resolution, 1 Smith's L. C. 62; *Bolton v. Barry*, 12 L. R. Ir. 158; *Borrowes v. Delany*, 24 L. R. Ir. 503; *Bruce v. Steen*, 14 L. R. Ir. 408, 426, 428, 431; *Carrickfergus U. D. C. v. Martin*, [1906] 2 Ir. R. 79; XI. Quart. Land Reps. 149; *Sturges v. Ryan*, 24 L. R. Ir. 305; 32 Henry VIII., c. 34; Deasy's Act, 1860, s. 13; Shep. Touchstone 161. The covenant to pay out of the original rent does not bind plaintiff to pay out of the reduced judicial rent: *Nettles v. Murphy*, 30 L. R. Ir. 564; *Wilson v. Smyth*, 23 Ir. L. T. R. 7.

Harrison, K.C., and *W. H. Brown* for the defendant.—The plaintiff keeping the capital must pay the interest: *Knox v. Baxter*, 19 L. R. Ir. 460; *Irish Land Commission v. Magorian*, [1901] 2 Ir. R. 445; *O'Connor v. Smith*, 20 L. R. Ir. 396; *Pakenham v. Williamson*, 30 L. R. Ir. 292. Covenant to pay the interest runs with the land: *Clegg v. Hands*, 44 Ch. D. 503; *Vyvyan v. Arthur*, 1 B. & C. 410; Platt on Covenants 482; *Irish Land Commission v. Brown*, [1904] 2 Ir. R. 200; VII. Quart. Land Reps. 193.

MADDEN, J.—The case of the *Carrickfergus U. D. C. v. Martin* decided that, when a statutory yearly tenancy has been created under the Land Act of 1887, the lease as between lessor and lessee must be taken to have expired, and that the covenants and conditions

in the lease cease to have any contractual operation and continue to operate if at all only so far as they are imported into the statutory tenancy by the provisions of s. 21 of the Act of 1881 and the Act of 1887. There are therefore three questions for our consideration in the present case :—First, what is the construction and effect of this condition or covenant in the lease of 1873 ? Secondly, whether it is a condition applicable to a tenancy from year to year and therefore a condition imported into the statutory tenancy ? Thirdly, on the assumption that it is not so applicable, what is the destination of the deposit as regulated by the general principles of law ? Now, as to the first point, the meaning of the covenant is clearly expressed, but, inasmuch as there has been a devolution of title as regards both lessor and lessee, it becomes necessary to consider whether this is a covenant running with the land. Does the covenant touch and concern the land in the words of *Spencer's Case* in such a way that its benefit or burden is capable of running with it ? It does certainly concern the rent issuing out of the land, inasmuch as the amount of rent payable each year is affected by its provisions. Such a covenant, in my opinion, is not collateral or independent, but intimately connected with the enjoyment of the demised land, and is a covenant running with the land. The next question is whether the covenant affected the statutory tenancy which came into existence on the fixing of the fair rent. The

KING'S
BENCH.

May, 1907.

KING'S
BENCH,
—
May, 1907.

deposit here is to be by way of security for the payment of the rent and the due performance of the covenants in the lease, and that fact distinguishes the present case from *Borrowes v. Delany*, 24 L. R. Ir. 503, where the sum of £40 was specifically allocated to meet the rent for a certain half-year and not by way of security generally. The terms of the covenant in the present case correspond to those in the case of *Bolton v. Barry*, 12 L. R. Ir. 158. In that case the term of the lease had expired and the statutory tenancy had come into existence under s. 21 of the Act of 1881. In the present case, by virtue of the Act of 1887, the condition of affairs is the same as if the lease had expired, and s. 21 of the Act of 1881 thus becomes applicable. In that case Morris, C.J., in delivering the judgment of the majority of the Court, says :—"In my judgment the deposit of £500 is just as applicable to a tenancy from year to year as to a lease. Section 21 transmutes the tenant into a present tenant, but it does so with all the existing conditions applicable to such transmuted tenure, and the landlord is entitled to hold the £500 as a security against the conditions of the lease." Unless the provision in the covenant before us with regard to the last year's rent differentiates this case from *Bolton v. Barry* this case is binding on us, and establishes that the covenant with regard to the deposit of £200 was applicable to the judicial tenancy. Now, this covenant cannot survive as an unilateral obligation, and if the

£200 remains as a security for the landlord he must perform his part of the condition and allow £10 a year to the tenant out of the rent. A point was raised by the plaintiff that if this covenant to allow interest on the £200 out of the rent was not merely a collateral covenant the Land Commission ought to have taken it into account in fixing the fair rent. Meredith, J., refused to take this circumstance into account in fixing the fair rent, and in my opinion rightly. The agreement as to the deposit, though intimately connected with the rent and therefore running with the land, is in another sense collateral with the rent of the holding, as that word is understood in regard to the Land Law Acts. In the case of *O'Connor v. Smith*, 20 L. R. Ir. 393, FitzGibbon, L.J., lays down that the rent with which the Land Act of 1881 is conversant means "the rent *reddendum* for the use and occupation of the land under and in accordance with the terms of the contract of tenancy." Here the case is stronger, for the allowance is not dealt with as part of the rent, but as an annual sum of £10. In my opinion the decision in *Nettles v. Murphy* does not rule the question here. There was in that case no deposit of money by way of security, and the only question involved in it related to the rent of the holding. The decision turns on the effect to be given to a covenant in the lease by which the lessor, in certain events, was bound to make an abatement to the lessee as against the specific

KING'S
BENCH.

May, 1907.

KING'S
BENCH.

May, 1907.

rent named in the lease. [Cites judgment of Andrews, J., p. 567.] In the present case there is no suggestion of a new contract. The contract relating to the deposit was contained in the lease of 1873, and the continuing effect of such a contract and its applicability to a tenancy from year to year is established by the decision in *Bolton v. Barry*. In my opinion the provision in the covenant with regard to the last year of the lease does not distinguish this case from *Bolton v. Barry*. That provision is merely ancillary to the governing part of the contract by which the deposit was constituted a continuing security for the rent so long as the relation of landlord and tenant should exist. If I had been compelled to come to the conclusion that the covenant was inapplicable to a yearly tenancy an important question would have arisen as to whether the tenant would not have been entitled to a return of his deposit. That question, however, does not arise here. I therefore hold that the defendant, being entitled to the annual allowance claimed by him, is entitled to judgment.

BOYD and DODD, JJ., concurred.

Solicitors for the plaintiff: *W. Young & Son.*

Solicitor for the defendant: *R. J. Porter.*

[*Note up on pp. 97, 300 and 397 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of the HON. R. S. G.
STAPLETON COTTON.

Feb. 10, 1908.—*Land Purchase Acts—Practice—*
Life annuity—Retainer of sufficient money to
meet—Objection by annuitant—Irish Land Act, LAND
COMMISSION.
Feb., 1908.
1903, s. 24 (4).

Where the vendor of an estate which had been sold under the Irish Land Act, 1903, applied that a sufficient amount of the proceeds of the sale to secure the payment of a life annuity charged upon the lands sold should be invested by the Land Commission pursuant to s. 24 (4) of the Act :

Held, that this course should be adopted, notwithstanding an objection by the annuitant, who claimed to be entitled to have the annuity redeemed and the redemption price paid out to her.

Application on the allocation of the final schedule that such amount of the proceeds of sale should be retained and invested in Government securities as might, in the opinion of the Judicial Commissioner, be sufficient by means of the dividends thereof to keep down or otherwise provide for a life annuity of £100 charged upon the lands sold, and also such additional amount

LAND
COMMISSION.

Feb., 1908.

as would be sufficient to meet the contingency for further costs, expenses and interest.

Osborne for the vendor.—The vendor does not wish to redeem this annuity, but prefers that its payment should be secured by retaining a sufficient amount of the purchase-money in Court, as provided in s. 24 (4) of the Irish Land Act, 1903. The annuitant suffers no harm, and cannot complain.

Jellett, K.C., for the annuitant.—I am entitled to have my annuity redeemed and the redemption price paid to me pursuant to s. 31 of the Act of 1896. Discretion is to be exercised in applying s. 24 (4), and the Court must have something to induce it to depart from the ordinary practice. This is merely an application by the vendor without any evidence of special facts, and, consequently, the Court is not in a position to consider whether it is a case for discretion: s. 24 (6); *Dolling's Estate*, XII. Quart. Land Reps. 22. Sub-s. 4 was meant for cases where the redemption price could not be paid out owing to restraint on anticipation or such like cause.

[WYLLIE, J.—Vendors have all refused up to the present. Suppose it is a bad life. If the vendor is willing that a sufficient amount should be retained, there is a strong presumption that it is. The worse the life the more anxious the annuitant would be that the sub-section should not be applied. I cannot conceive how you can

In re COTTON'S ESTATE.

have a greater right than a right to the full amount of your annuity.]

LAND
COMMISSION.

Feb., 1908.

Owens's Estate, [1900] 1 Ir. 151 ; II. Quart. Land Reps. 1. The law is still the same, but there is this sub-section modifying it. The procedure is never adopted against the will of the parties interested.

[WYLIE, J.—I think I could retain money in any particular case against the will of the vendor.]

It should not be done without special facts on the mere request of the vendor.]

WYLIE, J.—I have rights given to me by Act of Parliament, and power is given to make exceptions only in certain cases. I am clear that if the annuitant gets her full annuity she has no complaint to make, and I will take care there is enough invested to give her full security without any danger. I will direct the purchase of £2,880 India 3½ per cent. Stock, and order that £50 be paid half yearly to the annuitant. The balance will be available for any costs that may be incurred.

Solicitors for the vendor : *Martin King French & Ingram.*

Solicitors for the annuitant : *French & French.*

[*Note up on p. 1085 of Cherry's Irish Land Act, 1903.*]

LAND
COMMISSION.

June, July,
1908.

to said lease of June 26, 1819. There is no reference in the conveyance to any renewal of the lease or to whether any lives were in being, nor was there any assignment of arrears of rent or of renewal fines or any reference to same. On Feb. 27, 1908, an order was made for redemption of the rent of £105 15s. 10d. and any exceptions or reservations in the lease, and the value of the reversion thereon, at the sum of £2,100. That sum included the value of all future fines which, if a fee-farm grant had been taken out, would have been included in the fee-farm rent, but no arrears of fines, whether accrued since the purchase in 1902 or during the ownership of any preceding owner of the reversion. The entire purchase-money of the estate is only £2,100, which, with the bonus added, after redeeming prior outgoings, such as tithe rent-charge, is insufficient to satisfy the redemption price of the rent and arrears of rent, and therefore there is no money for the payment of renewal fines unless they are to be paid in priority to the redemption price of the rent. The examiner has placed these renewal fines on the final schedule in such priority, and Mary Kidd has filed an objection claiming priority for the redemption price of the rent over the claim for renewal fines, and the only question I have to decide is which is entitled to priority. Under s. 16 (1) and s. 24 (1) of the Act of 1903 all claims that attached to the lands prior to the date of the vesting order as from that date attach to the purchase-money in

like manner as they attached to the land, and by s. 31 (1) of the Act of 1896 are to be redeemed or satisfied out of such purchase-money. If the purchase-money is not sufficient to redeem or satisfy all, they must be paid according to their proper priority. Now, how were the claims for arrears of fines and for the rent respectively attached to the lands prior to the sale? The arrears of fines were not a charge upon the land, they were secured only by the personal covenant of the lessee. No doubt the lessee could not claim a renewal of the lease or a fee-farm grant without paying up all arrears of fines whether due to the then owner of the reversion or some predecessor-in-title. But they could not be enforced against the land or raised out of it as a charge. The rent, on the other hand, is secured by the entire fee-simple value of the land. If the lessee did not pay she could be evicted for non-payment, the lease could be determined, and the reversioner would have the fee discharged of the lease. It was not contended, nor, I think, could it be contended, that in such a case the reversioner would take possession of the fee discharged of the lease, but subject to arrears of fines or of rent due to her predecessor-in-title. It was contended that, as the lessee had sold the fee, the purchase-money which represents the fee must be dealt with as if the lessee had taken out a fee-farm grant prior to the sale, and that, as, in order to get a fee-farm grant, the lessee would have had to pay all the arrears of fines,

LAND
COMMISSION.
June, July,
1908.

LAND
COMMISSION.

June, July,
1908.

these arrears should be paid out of the purchase-money. As against any interest of the vendor in the purchase-money, I think that contention is right, though I am not now called upon to decide it. But, supposing the lessee had taken out a fee-farm grant, what would have happened? Why the grantee would have paid out of her other property all arrears of fines and rent, and would have taken the fee, subject to a fee-farm rent made up of the former rent payable under the lease, together with such addition thereto as would represent the future fines payable under the lease. In that case the owner of the reversion would still have the entire fee-farm rent secured by the entire fee-simple value of the lands. If, on the other hand, the lessee, either from inability or unwillingness, had declined to pay the fines or take out a fee-farm grant, the lease would have determined, and the reversioner could have recovered possession discharged of the lease and free from all claims for arrears of fines. Therefore, it appears to me clear that, no matter which of the three courses the lessee might have taken, whether she had allowed the lease to be evicted for non-payment of rent, or to be determined by a refusal to renew or take a fee-farm grant, or had paid the fines in arrear and taken out a fee-farm grant, the reversioner in each case would have had his reversionary interest secured to him by the value of the entire fee-simple of the lands, free from any claim against or charge upon the lands for arrears of fines. That being

so, it seems to me also clear that, under the Land Purchase Acts and the order attaching claims to the purchase-money, which represents the fee, the reversioner is entitled to be placed in the same position as regards the purchase-money—i.e., to have the value or redemption price of her reversionary interest secured by the entire purchase-money free from all claims for arrears of fines, but subject, of course, to the redemption of all interests superior to both. In my opinion therefore, the redemption price of the reversionary interest must be paid out of the purchase-money in priority to the claim for arrears of fines, and the objection of Mary Kidd must be allowed.

LAND
COMMISSION.
June, July,
1908.

Solicitor for the vendor : *R. J. Ferguson.*

Solicitors for Mary Kidd : *Kenny & Stephenson.*

Solicitor for H. B. Weldon : *D. S. Doyle.*

[*Note up on pp. 1075 and 1085 of Cherry's Irish Land Act, 1903, and on p. 568 of Cherry and Wakely's Land Acts, 8rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of THOMAS FROST.

LAND
COMMISSION.
Nov., 1908.

Nov. 3, 5, 1908.—*Land Purchase Acts—Repurchase of demesne by tenant-for-life—Application by remainderman that land resold should devolve in accordance with trusts of the settlement—Irish Land Act, 1903, s. 3 (4).*

The tenant-for-life of an estate under an indenture of marriage settlement, sold the entire estate to the Land Commission under s. 6 of the Irish Land Act, 1903, and repurchased that portion of the estate consisting of the demesne and other lands on which he resided for a sum of £1,500, advanced by the Land Commission under s. 3 (2), which sum represented the full value of the lands so repurchased :

Held, that the remainderman was not entitled to an order under s. 3 (4) of the Irish Land Act, 1903, that the lands so resold should devolve in accordance with the trusts of the settlement which, at the date of the sale, affected the estate.

Application on behalf of Solomon Frost, the owner of the reversion in fee in the estate

sold in this matter, expectant upon the determination of the life estate of the vendor, Thomas Frost, for an order declaring that portion of the lands resold to the said vendor by the Land Commission should devolve in accordance with the terms of the settlement which, at the date of the sale to the Land Commission, affected it. By the joint effect of a marriage settlement dated March 4, 1867, and of the provisions of the will of his father, dated June 2, 1869, Solomon Frost became entitled absolutely to the fee-simple reversion of the lands sold in this matter, subject to the life estate of the vendor created by the said settlement. The entire estate had been sold for £4,500 by Thomas Frost to the Irish Land Commission in pursuance of a proposal made by the Irish Land Commission under s. 6 of the Irish Land Act, 1903, and the funds had been allocated. One of the terms of the said proposal was that the said Thomas Frost should enter into an undertaking to repurchase the demesne and other lands in his occupation at the sum of £1,500, to be advanced by the Land Commission. The said demesne and other lands consisted of fifty-nine acres one rood of the lands of Feenagh, in the county of Clare, on which were situated the mansion house and residence in which the vendor resided. The purchase-money which, after providing for the redemption of superior interests, amounted to £3,595, had been apportioned between Solomon Frost and Thomas Frost by mutual agreement.

LAND
COMMISSION
Nov., 1908.

LAND
COMMISSION.
Nov., 1908.

The demesne was repurchased by an advance of £1,500.

A. M. Sullivan, K.C., for Solomon Frost.—The sum for which the demesne was repurchased was inadequate, and the remainderman would be at a loss if restricted to the purchase-money of the estate.

C. F. Doyle, K.C., for Thomas Frost.—The £1,500 was the full selling price of the demesne, and the full measure of Solomon Frost's rights was the £4,500 purchase-money of the entire estate, including the demesne, less the reductions necessary for the redemption of superior interests, and subject to the life estate of Thomas Frost. The order asked for would amount in effect to the creation of a new estate in remainder for the benefit of Solomon Frost. The demesne has been (with the exception of seven years) continuously in the possession of Thomas Frost since 1867, and large sums were expended by him on improvements. If the order should be made, then Thomas Frost should be declared entitled to a charge upon the reversionary interest in respect of this outlay. The Act provides that the order should be made only upon just and reasonable conditions.

Cur. adv. vult.

WYLLIE, J.—Solomon Frost was entitled to the lands sold in remainder expectant on the death of the tenant-for-life. The remainderman, as such, has applied for an order

under s. 3 (4) of the Irish Land Act, 1903, that the lands resold should be declared subject to the trusts of the settlement. Now, I enquired very fully into this matter in the offices of the Estates Commissioners, and found that it was not an ordinary case of a sale of tenanted land and demesne land, but was in reality a sale of a large farm of 250 acres, on which there was a good farmhouse and offices. There was no tenant; the whole farm was entirely sold to the Estates Commissioners, and they fixed the entire value, including holdings and demesnes, at £4,500. That was on the terms that the lands should be broken up in lots. Several parcels were vested in purchasers, one parcel was resold to the vendor, and £1,500 was placed on that parcel, apportioned on it as part of £4,500, in the same manner as in the case of the other parcels. Under these circumstances the Estates Commissioners bought the lands and treated £4,500 as the selling value of the entire estate, irrespective of the vendors' buying back portion, and it does not seem to me that the remainderman has suffered any loss from the way in which the sale has been carried out. It cannot be called a repurchase of demesne, it is a repurchase of part of the land resold by the Estates Commissioners. Accordingly the motion must fail. That being so I do not want to go further in stating my views of sub-s. 4, as it might raise difficulties hereafter. The section must be construed according to the facts of each case. The sale was for

LAND
COMMISSION.
Nov., 1908.

LAND
COMMISSION.

Nov., 1908.

the full selling value, and the motion was entirely grounded on the fact that the parcel had been sold and repurchased by the vendor.

Solicitors : *Maurice Healy ; Robert Frost.*

[*Note up on p. 1057 of Cherry's Irish Land Act, 1903.*]

CIRCUIT CASE.

(Before KENNY, J.)

M'KONE AND OTHERS v. CLARKE.

Dundalk, July 2, 1907.—*Landlord and tenant—Agreement for lease—Construction—Letting “free of all rates, taxes, or other charges”—Town rates—Rates charged on land.*

CIRCUIT
CASE
July, 1907

T. B. agreed to let a house and premises in Dundalk to P. C. at a yearly rent of £14 10s., “free of all rates, taxes and other charges” :

Held, that the lessor was bound to pay the town rates payable in respect of the premises, though not charged upon the premises.

Parish v. Sleeman, 1 De G. F. & J. 326 ; Palmer v. Power, 4 Ir. C. L. R. 191 ; Gloster v. Murphy, [1894] 2 Ir. R. 49, distinguished.

The defendant, Patrick Clarke, for some years prior to the date of the agreement for a lease sued on, held the premises therein comprised, as tenant from year to year, from Thomas Byrne, at the yearly rent of £14 10s. The landlord paid all rates and taxes payable in respect of

**CIRCUIT
CASE.**

July, 1907.

the holding during the continuance of the tenancy. The premises were situate in Castletown Road, in the town of Dundalk. On Nov. 24, 1902, Thomas Byrne, the landlord, executed an agreement for a lease of the premises to the defendant, the material parts of which agreement were as follows :—

“Memorandum of agreement made this 24th day of November, 1902, between Thomas Byrne, of Donaghmore in the County of Louth, farmer, of the first part, and Patrick Clarke, of Castletown Road in the town of Dundalk and said County of Louth, assurance agent, of the other part. Whereas the said Patrick Clarke holds a house and premises under the said Thomas Byrne, situate at Castletown Road, Dundalk, in said county, as tenant from year to year, at the yearly rent of £14 10s. per annum, payable half-yearly on the first day of May and the first day of November in each year. Now, the said Thomas Byrne hereby agrees to make and continue the said Patrick Clarke as tenant of the house and premises before mentioned, situate at Castletown Road, in the town and parish of Dundalk and County of Louth, aforesaid, and to have and to hold same for the term of his life, and also of his wife, from the first day of May next ensuing after the date of this agreement, at the yearly rent of £14 10s., free of all rates, taxes or other charges, said rent to be paid half-yearly in equal proportions during the months of May and November in each year, and said Thomas Byrne binds himself not to raise the rent of said Patrick Clarke during the lives mentioned in this agreement, and in consideration of the large amount of money already expended by said Patrick Clarke in making additions and permanent improvements to said house and premises he further agrees to give said Patrick Clarke a right of way” (therein described).

After the execution of this agreement Thomas Byrne, the landlord, continued, as before, to

pay all rates and taxes due in respect of the premises until his death. On the death of Thomas Byrne the plaintiffs became entitled to his interest in the premises, and refused to pay the town rates due in respect thereof. Under threat of distress the defendant paid these rates, amounting to £1 7s. 6d., to the rate collector. A sum of £7 5s. being due to the plaintiffs for the next half year's rent to May 1, 1907, the defendant deducted the said sum, £1 7s. 6d., so paid by him for town rates, and tendered £5 17s. 6d. to the plaintiffs. This sum was accepted by the plaintiffs on account, and a Civil Bill was issued on their behalf to recover £1 7s. 6d., the balance of the rent. The Civil Bill was heard before Judge Kisbey at Dundalk on May 23, 1907, who dismissed the case on the merits. The plaintiffs appealed, and the appeal was heard by Mr. Justice Kenny at the Summer Assizes, 1907.

CIRCUIT
CASE.
July, 1907.

M'Cann for the plaintiffs.—(1) On the true construction of the agreement the rent was to be “free of” all rates—that is, the landlord was entitled to receive a net rent: *Parish v. Sleeman*, 1 De G. F. & J. 326. (2) If this is wrong, and the landlord is bound to pay “all rates, taxes or other charges,” then rates and taxes should be limited to such rates and taxes as are charges upon the lands: *Palmer v. Power*, 4 Ir. C. L. R. 191; *Gloster v. Murphy*, [1894] 2 Ir. R. 49. (3) Under the Local Government (Ir.) Act,

CIRCUIT
CASE.

1898, town rate is part of the consolidated poor rate, and, therefore, any contract to deduct it from rent is void.

Donaldson for the defendant.—*Parish v. Sleeman* does not apply. In Ireland the words “free of” are used as equivalent to “inclusive of.” In *Barcroft v. Welland*, 12 L. R. Ir. 35, it was held that the tenant was entitled to deduct the entire poor rate. On the plaintiffs’ construction the words “free of rates, taxes or other charges” are mere surplusage. The antecedent of “free” is not “rent,” but “premises.” *Palmer v. Power* should not be extended. In that case the word “rates” was not used. All the judges in *Gloster v. Murphy*, followed *Palmer v. Power* unwillingly. As to the third point, the Local Government (Ir.) Act does not apply. A rate struck under the Towns Improvement Act, as this was, is not part of the poor rate. It is struck on a different basis (Vanston, *Law of Municipal Towns*, p. 363, note x.). It is a rate raised independently of the Local Government Act, and comes within s. 53 (2) (b) of that Act.

KENNY, J., held that the case of *Parish v. Sleeman* did not apply, that the premises were let free of rent, and that the landlord was bound to pay the rates and to keep the tenant indemnified. He held also that the insertion of the word “rates” distinguished the present case from *Gloster v. Murphy* and *Palmer v. Power*,

and that the tenant was to be discharged from taxes otherwise payable by him as tenant, but not necessarily charges upon the premises.

CIRCUIT
CASE.

July, 1907.

Solicitors : *D. O'Connell ; A. N. Sheridan.*

[*Note up on p. 79 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

CIRCUIT CASE.

(Before WRIGHT, J.)

BERRYMAN AND OTHERS v. M'CRUM.

CIRCUIT
CASE.
March, 1907. *Belfast, March 26, 1907.—Landlord and tenant
—Rent—Guarantee given to a lessor, “his heirs,
executors, administrators and assigns”—Assignment
of reversion—Right of assignee to sue on
guarantee.*

*An assignee of the lessor's estate in lands can
sue on a guarantee for payment of the rent and
performance of the covenants by the lessee, given
to the lessor, “his heirs, executors, administrators
and assigns.”*

By an agreement in writing dated Nov. 17, 1902, Catherine Berryman, David Mark, and Isabella M'Bride let to John Barr M'Crum a house, No. 2 Catherine Street, Belfast, on a tenancy for thirteen months, from Jan. 1, 1903, and thereafter from quarter to quarter, and John Barr M'Crum agreed to pay rent therefor at the rate of £20 per annum, and to keep the premises in repair. By a guarantee of the same date the defendant, John M'Crum, guaranteed “to the said Catherine Berryman, David Mark and Henry M'Bride, their heirs, executors, administrators and assigns,” the payment of the said rent and the performance of the said

agreement to repair by John Barr M'Crum. Isabella M'Bride died in the year 1905, and by her will devised all her estate and interest in the house in question to Henry M'Bride. The tenant, John Barr M'Crum, did not pay the rent for the four months ending Aug. 1, 1906, and did not keep the premises in repair, and this action was brought by Catherine Berryman, David Mark, and Henry M'Bride against John M'Crum on his guarantee to recover £10 16s. 9d., the amount of the rent and mesne rates unpaid by John Barr M'Crum, and £4 11s. 6d., the cost of repairs not carried out by him in accordance with his agreement, in all £15 8s. 3d.

CIRCUIT
CASE.
March, 1907.

Henry Hanna for the plaintiffs.

J. Martin Whitaker for the defendant.—The contract of guarantee cannot be assigned, and so can be sued on only by the original parties to it: *M'Chesney v. M'Kee*, 40 Ir. L. T. R. 31.

WRIGHT, J., in a considered judgment, said :—I formed a strong opinion as to this point on hearing the appeal, but as it was stated that it was one of a great importance to landlords and tenants in Belfast, as the form used is a common form, I have given it careful consideration. In my opinion the guarantee was given really and substantially to the landlords. I do not think that the fact relied on—that one of the lessors had died and that her estate had passed to her devisee—made any difference whatever

CIRCUIT
CASE.

March, 1907.

in the guarantor's liability. The contract was made with the lessors, their executors, administrators and assigns, and looking at the contract as a whole it is clear that it was intended to subsist and enure for the benefit of all successive and continuing landlords who should represent the lessor's interest in the fee. Accordingly, I have come to the conclusion that the defendant is liable for all the matters included in the civil bill, and I reverse the decision of the Recorder, and, making a slight deduction in respect of repairs, I will give a decree for £15, with costs in the Court below and of the appeal.

Solicitor for the plaintiffs : *James Stewart.*

Solicitors for the defendant : *Wm. Harper & Co.*

CIRCUIT CASE.

(Before GIBSON, J.)

NUGENT v. WILSON.

Longford, July 3 ; Dublin, Nov. 7, 1908.—
*Land Purchase Acts—Landlord and tenant—
Agreement to purchase holding—Payment of rent
by tenant after date of agreement—Agreement
signed and antedated by landlord after payment—
Action for money had and received.*

CIRCUIT
CASE.

July, Nov.,
1908.

A landlord agreed to sell a holding to the tenant thereof under the Land Purchase Acts, it being part of the terms of purchase that a gale of rent should be at once paid by the tenant. The tenant, prior to Nov., 1906, signed an agreement to purchase, but asked for time to pay the rent, which the landlord consented to give. The gale of rent was, on Nov. 7, 1906, paid by the tenant, and in Dec. the landlord executed the agreement (which until then had been undated), antedating it Nov. 1, 1906, and lodged it with the Land Commission :

Held, that an action by the tenant for the recovery of the gale of rent on the ground that the payment was a violation of s. 35 of the Land

CIRCUIT
CASE.

July, Nov.,
1908.

Law (Ireland) Act, 1896, was not maintainable.

The defence of "payment in mistake of law" would not avail against a claim for recovery of arrears of rent paid in violation of s. 35 without valid consideration.

Appeal at Longford Summer Assizes, 1908, from a dismiss on the merits in an action for £30 5s., money had and received, and paid by the plaintiff for the use of the defendant. From the evidence it appeared that the defendant had agreed with his tenants to sell at 5s. in the £ reduction on second term rents, and that all rents should be paid by them to Dec. 1, 1906, but that the gale of rent from May to Nov. might, if they wished, be added to the purchase-money. In some cases the latter course was adopted, and in many others the tenants paid the half year's rent to Nov. 1, 1906. The purchase price of the plaintiff's holding was £1,396, but if the gale of rent had been added it would have been £1,426. The plaintiff signed his agreement on Oct. 4, 1906, but asked for time to pay the gale of rent, which the defendant agreed to give. On Nov. 7, 1906, the plaintiff paid the gale of rent, and in the following December the defendant executed the agreement, antedating it Nov. 1, 1906, and lodged it with the Land Commission. The plaintiff now sought to recover the gale of rent so paid on the ground that it was in violation of s. 35

of the Act of 1896. The case came before Gibson, J., at Longford, and he delivered judgment in Dublin on Nov. 7, 1908.

CIRCUIT
CASE.

July, Nov.,
1908.

Patchell, K.C., for the plaintiff.

E. S. Murphy for the defendant.

GIBSON, J.—This was an appeal from a dismiss in an action brought by a tenant against a landlord to recover in all £30 5s., rent paid in alleged violation of s. 35 of the Act of 1896, c. 47. Both parties have since died, and the proceedings have been revived in the names of the respective personal representatives. The facts are these :—The tenant before Nov., 1906, agreed to buy his farm on certain terms, one of which was that the gale of £30 5s. last due should be at once paid. He signed a statutory agreement, but not having the £30 5s. at the time asked for a few days' grace, which he got, and paid the amount on Nov. 7, 1906. The landlord thereupon subsequently on Dec. 5, 1906, signed the agreement, and filling in the agreement, previously blank, with the date Nov. 1, 1906, lodged it with the Land Commission. The blank as to date was so filled without communication with the tenant, and, until the landlord executed the agreement, there was no binding contract. Under these circumstances, Mr. Patchell, K.C., for the tenant, contends that the landlord is estopped from denying that the contract was executed on Nov. 1; he argues

CIRCUIT
CASE.
July, Nov.,
1908.

that the arrear then due was irrecoverable, and must be refunded. For the landlord, Mr. Murphy contends (1) that the payment was proper and legitimate; (2) that even if it was not, it was made in mistake of law, and repayment cannot be enforced. This latter defence is not well-founded. Section 35 was intended for the protection of the tenant and the Land Commission. I think that arrears paid in violation of the section without valid consideration can be recovered back : *Re Kearley v. Thompson*, 24 Q. B. D., at p. 746. The case, therefore, turns on the first point. The difficulty is caused by the tripartite character of the bargain, which was represented to the Land Commission as made on Nov. 1. As the tenant was given time, and made the payment before the landlord actually signed, and as it is quite clear that the landlord would not have signed without getting the payment, I am of opinion that an action for money had and received is not maintainable. The antedating of the contract by the landlord does not invalidate the payment by relation back; and, so far as I can see, there can be no prejudice to the Land Commission, as when the document was executed there was no arrear. The action is of an equitable type, and it would be contrary to fair dealing to allow a tenant who has got the benefit of a contract by making a payment previously agreed on to repudiate the validity of the payment made in order to induce the landlord to execute. What

the landlord did was that he treated the payment as made at the time the tenant had agreed to make it, and he signed on that basis.

CIRCUIT
CASE.

July, Nov.,
1908.

Solicitor for the plaintiff: *M. M. Kenny.*

Solicitor for the defendant: *John Wilson.*

[*Note up on p. 576 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of PAUL CHRISTMAS ANDERSON, continued in the names of T. W. ANDERSON and A. C. ANDERSON, the Trustees and Executors of his Will.

LAND
COMMISSION.
—
Nov., 1907.

Nov. 5, 9, 1907.—*Land purchase—Originating application—Request to purchase demesne included in—Death of vendor—Power of Land Commission to purchase and resell the demesne to trustees and executors of vendor.*

The absolute owner of an estate having agreed to sell to his tenants under the Irish Land Act, 1903, filed an originating application with the Land Commission therein requesting the Land Commission to purchase his demesne, and stating that the vendor was desirous of repurchasing the same. The vendor died before the advances to the tenants had been sanctioned, having devised and bequeathed all his real and personal property to the trustees and executors of his will, upon trust to sell the same and dispose of the rents and profits as in the said will provided, but with power to postpone the sale and conversion of his estate for

so long as they might think fit. The proceedings were continued in the names of the executors, and the sale of the tenanted lands was completed.

LAND
COMMISSION.
Nov., 1907.

On a question arising as to whether the Estates Commissioners had jurisdiction to purchase the demesne, and make an advance for the repurchase thereof by the trustees and executors, who were anxious that this should be done :

Held, that they had such jurisdiction.

Questions of law submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The facts, as set forth in the memorandum of the Estates Commissioners, were as follow :—The lands comprised in the originating application, which was filed on Aug. 23, 1905, included (a) tenanted lands for which advances were sanctioned on Nov. 7, 1907, and (b) demesne lands, containing 257 acres 3 roods 35 perches, with mansion house, offices, and gardens. The originating application executed by the vendor contained an application to the Land Commission to purchase the said demesne, and a statement that the vendor was desirous of repurchasing the same. The vendor, Paul Christmas Anderson, was absolute owner in fee-farm. The said vendor died on Feb. 24, 1907, before the completion of the sale, having made his will, of which he appointed Thomas William Anderson and Alexander Carew Anderson his executors and trustees, and bequeathed and devised to

LAND
COMMISSION.
Nov., 1907.

them all his real and personal estate upon trust, to sell, and out of the profits to pay debts and certain legacies, and to pay the income of the residue of the said proceeds to his sisters, Jane Ellen Anderson, Henrietta Anderson, and Susanna Anderson, and the survivor of them, during their lives or life, and after the death of the survivor of them, to pay certain legacies, and subject thereto to pay and transfer the residue of the said trust property to the said Alexander Carew Anderson for his own use and benefit. And the testator declared that his said trustees or trustee might postpone the sale and conversion of his real and personal estate or any part thereof for so long as they should think fit, and that the rents, profits and income of such part of his property as should for the time being remain unsold or unconverted should be paid and applied to the person or persons to whom the same would for the time being be payable if such sale and conversion had actually been made. Probate of the said will was granted on May 10, 1907, to the said T. W. Anderson and A. C. Anderson. On June 3, 1907, an order was made to continue proceedings, *as to pending sales only*, in the names of the said T. W. Anderson and A. C. Anderson as executors of the said Paul Christmas Anderson. The *tenanted lands* were provisionally declared an estate on Feb. 23, 1906, and finally declared a separate estate on Nov. 7, 1907, and the advances in respect of such tenanted land,

amounting to £2,004, were paid to the credit of the matter on the same day. The said T. W. Anderson and A. C. Anderson, as such trustees and executors, were desirous of carrying out the sale and repurchase of the demesne for the benefit of the persons entitled under the will of the testator, and the Estates Commissioners were prepared to purchase the demesne for £10,289, and to advance the sum of £4,097 for its repurchase by the said trustees, provided such purchase and resale could be properly carried out under the terms of s. 3 of the Act of 1903. The following questions of law were submitted :—(1) Whether, the vendor P. C. Anderson having died since the originating application was filed, the proposal of the vendor to sell the said demesne lands with a view to their repurchase as mentioned in the said originating application can now be carried into effect with the trustees and executors of his said will ? (2) Whether the Estates Commissioners can, under s. 3 of the Irish Land Act, 1903, make an advance to such trustees and executors for the purpose aforesaid ?

LAND
COMMISSION.
Nov., 1907.

Samuels, K.C., for the trustees.—This became a proceeding in Court when the originating application had been filed, and the proceedings did not abate on the death of the vendor. The sale of the tenanted lands and of the demesne land are really portions of the same transaction. The right to an offer for the demesne was in the

LAND
COMMISSION.
Nov., 1907.

nature of an option which would survive. The trustees have power to sell, and there is nothing to prevent one portion of the sale from being continued as well as the other. He cited Landed Estates Court Act, s. 76; Cherry, p. 943; Irish Land Act, s. 3 (5); Settled Land Act, s. 21.

M'Gusty for the tenants-for-life.—The question is simply one of jurisdiction. The section is an enabling section (Hardcastle, pp. 108 and 229), and not for the benefit of particular landlords. The trustees have power to sell, but also power to postpone sale. The vendor had a right to an offer for the sale of his demesne. The right to repurchase demesne is like the bonus, an inducement to vendors to sell, ss. 3 (4 and 5), 48. He cited *Finlay's Estate*, 38 Ir. L. T. R. 101; *Massareenes' Estate*, 40 Ir. L. T. R. 16; *Powell's Estate*, 41 Ir. L. T. R. 210.

Cur. adv. vult.

WYLIE, J.—I do not think it necessary to express any opinion on the general effect of s. 3 of the Act of 1903. The testator was absolute owner in fee, but as the proceedings with reference to both the sale of the tenanted lands and the proposal as to the demesne were pending at the death of the deceased I think it was competent for the Estates Commissioners to make an order to continue proceedings in respect not only of the tenanted lands constituting the estate, but

also of the demesne. The proceedings can be continued in the names of the devisees in trust under the will.

LAND
COMMISSION.
Nov., 1907.

Solicitor for the trustees : *Dobbyn & M'Coy.*

Solicitor for tenants-for-life : *George Green.*

[*Note up on p. 1057 of Cherry's Irish Land Act, 1903.*]

IRISH LAND REPORTS.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, Bart., L.C., and
FITZGIBBON and HOLMES, L.JJ.)

BERNARD, Landlord, v. MOORE, Tenant.

Nov. 25, 1908.—*Land Law Acts—Long lease—
Full agricultural rent—Improvements—Tithe rent-
charge—Redemption of Rent (Ir.) Act, 1891* **APPEAL.**
(54 & 55 Vict., c. 57), s. 1. Nov., 1908.

The lessee under a long term served an originating notice for an order to redeem his rent and for an advance under the Land Purchase Acts, and the lessor having failed within the prescribed time to signify his consent to the redemption, the application to fix a fair rent came before the Court. It appeared that buildings and improvements representing £15 18s. a year had been made by the tenant, and that the landlord claimed that the full agricultural rent should be arrived at on the assumption that all the improvements, including the buildings, were

APPEAL. *made or acquired by him. The lands were also*
Nov., 1908. *subject to tithe rent-charges amounting to*
 £10 10s. 10d., payable by the tenant :

Held, that a fair rent should be fixed, as the tenant held at a full agricultural rent, and that in fixing a rent under the provisions of the Redemption of Rent (Ir.) Act, 1891, the value of the buildings and improvements which had been made by the lessee should not be charged against him, and that the tithe rent-charges should be deducted from the gross rent.

*Wynne v. Wilson, VI. Quart. Land Reps. 218 ;
1 N. I. J. R. 95, not followed.*

Case stated by Mr. Justice Dodd. An originating notice had been served by John Moore, the lessee, of an application to the Land Commission, under the Redemption of Rent (Ir.) Act, 1881, to redeem his rent and for an advance under the Land Purchase Acts to carry out such redemption, or, in case of the lessor not signifying his consent thereto in the prescribed manner and within the prescribed time, for an order fixing the fair rent to be paid for the holding. The holding in question was held under a lease dated Sept. 14, 1775, for a term of 8,900 years, from March 25, 1775, at the yearly rent of £75 16s., late Irish currency. The Sub-Land Commission (Mr. C. Litton Falkiner, chairman) being of opinion that the holding was not let at a "full agricultural rent," dismissed the application, and from that decision an appeal was taken to Mr. Justice Dodd. The case stated by His Lordship for the opinion

of the Court set out:—"The question for decision was whether the old rent, or rather the present rent of £69 19s. 4d., is or is not a full agricultural rent. It was contended before me that the full agricultural rent meant the annual sum which ought to be the fair rent of the holding on the assumption that all the improvements on the holding, including buildings, were made or acquired by the landlord, and that if this sum so ascertained exceeded the rent in the grant, then I was bound to hold that the holding was not held at a full agricultural rent. It was not disputed that the buildings and improvements were the tenants. The Sub-Commission, having ascertained that on this basis the full agricultural rent was £77 4s., dismissed the originating notice. They found the annual value of the land, excluding buildings, was £65 4s., the annual value of the buildings was £12, and the annual value of the other improvements was £3 18s. The Sub-Commission did not take into consideration, though urged to do so, some annual tithe rent-charges payable by the tenant in addition to the rent. Before me these were ascertained to amount to £10 10s. 10d. If the rent-charges were taken into consideration it was urged the full agricultural rent would be less than the rent in the lease, and the holding would be within the Act, and that the Sub-Commission should have so decided. Under these circumstances I referred it to my assessor, Mr. Lynch, for his report. He advised me that the gross letting value of the lands, exclusive of buildings, was

APPEAL.

Nov., 1908.

APPEAL. £73 2s. 7d. ; but he deducted, as an element to be considered, the sum of £10 10s. 10d., the amount of the two tithe rent-charges. He agreed with the Sub-Commission that the buildings were of the annual value of £12, and that the annual value of the other improvements was £3 18s. **Nov., 1908.** If the principle contended for by the solicitor for the landlord was right, the full agricultural rent would be £85 2s. 7d. Even if the annual rent-charges of £10 10s. 10d. were to be considered an outgoing that the tenant had to pay as an addition to the existing rent, the figure would still exceed the rent in the grant, and would fall within the principle. And the authority of *Wynne v. Wilson* (VI. Quart. Land Reps. 218) was relied on. Mr. Lawrence relied on the judgment of the present Master of the Rolls in that case and the categorical statement of the law in *Cherry*, p. 500 : 'It is only when the full agricultural rent so ascertained does not exceed the rent reserved in the lease or grant that the case comes within the Act.' I thought I was bound by the decision so far only as it was a decision by the then Judicial Commissioner, or it was a decision I ought to follow. It was stated that the decision had been approved of by the Court of Appeal. The tenant was in this position : If the figures of the Sub-Commission were accepted, with the sum for tithe rent-charges deducted, the holding would have been within the Act. Upon being pressed to state a case, I obtained a copy of the order of the Court of Appeal in the case referred to of

Joseph Wilson, grantor; Thomas Wynne, grantee, dated Dec. 20, 1901, and it appeared from the said order that the Court was of opinion that on the facts of that case the question of the mode of ascertaining the full agricultural rent did not arise. Inasmuch then, as the point had not apparently been finally dealt with, I consented to state a case on the two points. If I had been free to form my own judgment on the facts and figures given me by my assessor, he having advised me that a fair rent of the holding as it stands ought to be £59 13s. 9d., I should have been disposed to ask him for a special finding as to whether, having regard to all the circumstances of the holding and on the particular facts of this case, the rent in the lease was or was not, in his opinion, a full agricultural rent. But I did not consider that, nor did my assessor. I hold myself bound by the decision of the present Master of the Rolls in the case referred to. I refer to and incorporate as part of this case the pink schedule of the Sub-Commission and the report of my assessor, a copy of the lease, and the last assignment thereof. The questions I am asked to submit are:—
(1) Was I bound to act on the principle that the full agricultural rent was equivalent to the annual sum which should be the fair rent of the holding on the assumption that all improvements therein were made or acquired by the landlord?
(2) Was I bound to take into consideration, or ought I to have taken into consideration, the

APPEAL,
Nov., 1908.

APPEAL.
Nov., 1908.

tithe rent-charges as an element to be considered in arriving at a full agricultural rent ? ”

Hennesy, K.C. (with him *W. Murphy*), for the lessee, said what they wanted to secure for the lessee was the status of a present tenant and to have a fair rent fixed. In determining what was “a full agricultural rent” within the meaning of the Redemption of Rent Act they submitted that where the tenant had made the improvements himself, as in this case, their annual value should not be charged against him. The decision of *Meredith, J.*, in *Wynne v. Wilson*, VI. Quart. Land Reps. 218; 1 N. I. J. R. 95, was not, they contended, correct, and ought not to be followed. Most of the applications under the Redemption of Rent Act were made by fee-farm grantees, and if the principles laid down in *Mairs v. Lecky*, 29 Ir. L. T. R. 42; [1895] 2 Ir. R. 475, as regards fee-farm grantees, were applied in the cases of long lessees the Court should hold that the principle of *Wynne v. Wilson* was incorrect, and that the improvements ought not to be charged against the tenant. In ascertaining whether the lands were held at “a full agricultural rent” the Court was bound to deduct the tithe rent-charge: *Shiel v. Irvine*, VIII. Quart. Land Reps. 89; *Irish Land Commission v. Browne*, VII. Quart. Land Reps. 193.

There was no appearance for the lessor.

SIR S. WALKER, Bart., L.C.—Our answer to the first question will be “no,” because we are of

opinion that *Mairs v. Lecky* decides the question in Mr. Hennessy's favour. Our answer to the second question will be "yes." This holding, out of which £10 has to be paid as tithe rent-charge in ease of the landlord, is on that account less valuable to the tenant.

APPEAL.
Nov., 0

FITZGIBBON, L.J.—It appears to me that both in ascertaining the amount of the "full agricultural rent" for the purpose of deciding whether the case comes within the Redemption of Rent Act, and in fixing the fair rent in a fair rent application, the interests of the landlord and tenant respectively have to be considered. It appears to me that *Mairs v. Lecky* decides that the execution of improvements by a fee-farm grantee at his own expense does not increase the interest of the landlord, except in so far as it increases the security for the rent. The presumption that the improvements were to be credited to the landlord does not arise in this case. It would be a very extraordinary state of things if the full agricultural rent was to be ascertained on a basis so different from that on which the fair rent would afterwards be ascertained that there might be an enormous difference between the full agricultural rent and the fair rent. It appears to me that they must be ascertained on the same basis, and that *Mairs v. Lecky* practically so decides. To arrive at what was a full agricultural rent or a fair rent, tithe rent-charges must be taken into consideration. Tithe rent-charge is an interest belonging neither to the landlord nor to the

APPEAL.
Nov., 1908. tenant, but it is practically a charge upon both, or a deduction from the value of the interests of both, and the rent to be paid to the landlord cannot, therefore, include it. I am not certain that I understand the second question about tithe rent-charge as it is put, but as my colleagues have no doubt about the way in which it should be answered I do not differ from them.

HOLMES, L.J., concurred.

Solicitor for the lessee: *T. H. G. Wallis.*

[*Note up on pp. 470, 500, 511, and 555 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

COURT OF APPEAL.

(Before SIR S. WALKER, Bart., L.C., and FITZ-
GIBBON, and HOLMES, L.JJ.)

In the Matter of the Estate of CHRISTOPHER
CAVANAGH AND OTHERS.

Dec. 15, 1908 ; Jan. 22, 1909.—*Land Purchase Acts—Irish Land Act, 1903—Sale by middleman—Interest in lieu of rent—Non-payment of head rent—Claim of head landlord against the interest in lieu of rent—Land Law (Ir.) Act, 1896, s. 35 (1, 2).—Landlord and Tenant Act, 1860, ss. 20, 21.*

APPEAL.
Dec., 1908.
Jan., 1909.

Where agreements for sale by a middleman to his tenants under the Irish Land Act, 1903, have been lodged with the Land Commission, the head landlord as such is not entitled, when the head rent remains unpaid, to an order for the payment to him of any portion of the interest in lieu of rent collected by the Land Commission.

Motion on behalf of the Commercial Union Assurance Co. for an order that no further payment of interest in lieu of rent, payable under s. 35 (2) of the Land Law (Ir.) Act, 1896, be paid to the vendors or Christopher Cavanagh under the order dated Nov. 30, 1905, until the sum of £261 11s. 9d., being one and a half years

APPEAL. of head rent due to the applicants to Sept. 29, 1908, and all accruing gales of the head rent of Dec., 1908. £174 7s. 10d., payable to the applicants by the Jan., 1909. vendors under the lease dated Oct. 1, 1749 (under which the estate sold in the matter was held), be paid and discharged; and that in the meantime the said interest might be directed to be paid to Messrs. Hogan & Sons, the agents of the applicants, on account of the said arrears of rent and the accruing gales thereof, until discharged, and that after same had been discharged all future gales of the said head rent should be paid to the said agents out of the said interest in lieu of rent before any payment to the said Christopher Cavanagh or the vendors, the applicants undertaking, until such arrears and accruing gales of the head rent had been discharged, to pay in the first place, out of such interest, two tithe rent-charges charged on the said lands. The lands sold were held by the vendors under a lease for lives renewable for ever at a yearly rent of £188 18s. 6d. late currency, equivalent to £174 7s. 10d. sterling, and all the interest of the lessor had become vested in the applicants. The originating application was lodged on Nov. 24, 1905, and by order dated Nov. 30, 1905, the interest in lieu of rent payable under the purchase agreements, was directed by the Land Commission to be paid to Christopher Cavanagh, one of the vendors. It appeared that the purchase price amounted to £8,047, and the interest in lieu of rent to £281 13s. per annum.

The application was originally made to the Estates Commissioners, who refused to hear it, and informed the applicants that under the present practice all such applications should be made to the Judicial Commissioner.

APPEAL.
Dec., 1908.
Jan., 1909.

The vendor, *Mr. Cavanagh* (a member of the English Bar), appeared in person.

S. L. Browne, K.C., for the applicants.

WYLLIE, J.—I agree with *Mr. Cavanagh's* contention that the head landlord has not at present any charge upon the purchase-money or the interest payable thereon in respect of arrears of head rent, and that he cannot get hold of the interest in lieu of rent payable by the tenant purchasers or interfere with its payment to *Mr. Cavanagh* unless through the medium of s. 20 of Deasy's Act. Now, that section provides that where the middleman neglects to pay the head rent, the head landlord may, pursuant to the provisions of the section, serve notice on the sub-tenant requiring him to pay to the head landlord so much of the rent payable by the sub-tenant to the middleman as may be sufficient to discharge the gale or gales stated in such notice to be due from the middleman to the head landlord, and thereupon such sub-tenant shall be liable to pay to the head landlord all rent that may accrue due after the receipt of such notice, or so much thereof as may be sufficient to discharge such gale or gales. Now, seeing that under that section, had the sale not taken

APPEAL . place, the sub-tenant would, upon receiving
Dec., 1908. notice of arrears due, have been liable to pay,
Jan., 1909. and could have protected himself by paying, all
such arrears due by the middleman to the head
landlord, it would seem to me an extraordinary
thing to hold that where the middleman has,
by agreement with his sub-tenant under the
Land Purchase Acts, substituted for the sub-
tenant's rent interest in lieu of rent for many years
to come, and where s. 35 of the Act of 1896
provides that the sub-tenant is to pay the
interest in lieu of rent to the Land Commission,
and thereby takes away from the sub-tenant
the power to pay it to anyone else, the Land
Commission have no power to give the same
protection to the sub-tenant and the same relief
to the head landlord that they would have been
entitled to if the middleman had not sold.
Inasmuch, therefore, as the head landlord would
have been entitled to receive the gales of rent
from the sub-tenant direct under the provisions
of s. 20 of Deasy's Act, it seems to me that the
head landlord comes within the equity of the
terms of s. 35 (2) of the Act of 1896 as "such other
person as may prove himself to be entitled
thereto." Any other construction would work
great injustice during the years that will elapse
between the lodgment of the agreements and
the advance of the purchase-money. Under
s. 20 the head landlord, by serving the pre-
scribed notice, could have claimed payment
from the sub-tenant direct, and I hold that the

Land Commission is bound to give the sub-tenant and the head landlord the same protection and relief. I will declare that the interest in lieu of rent is applicable to pay off unpaid gales of rent due to the head landlord of which the Land Commission have had notice. This seems to me to be the only way to carry out the provisions of s. 35 of the Act of 1896 in the light of ss. 20 and 21 of the Act of 1860. If I have no power to do this, then a tenant-for-life, by selling the estate, may insist upon getting the entire interest in lieu of rent without paying any outgoings, thereby depriving persons having prior claims against the land of their former remedies, and allowing all to accumulate for years against the fee, because no claims against the land attach to the purchase-money until after the advance is made. The Land Commission have got notice that £261 11s. 9d. arrears of head rent have not been paid. I will make an order that the interest in lieu of rent be paid to the head landlord until that amount is paid off.

APPEAL

Dec., 1908.
Jan., 1909.

From this decision the vendor, Mr. Cavanagh, appealed.

The appellant in person.

S. L. Browne, K.C., for the respondents.

SIR S. WALKER, Bart., L.C.—The question on this appeal turns on the construction of s. 35 (2) of the Land Law (Ir.) Act, 1896, and the right of the Insurance Co. to be paid the

APPEAL. interest representing the former rent under the words "or such other person as may prove himself to be entitled thereto." I do not think the company has given such proof. I express no opinion whether, if they had served notice under s. 20 of Deasy's Act, 1860, they could by that means furnish such proof. Mr. Brown admits that his clients could not serve such notice. We will decide if necessary, that s. 10 of the Purchase of Land (Ir.) Act, 1885, does not apply. Therefore, the only question we have to consider is the meaning of the words of s. 35 of the Land Law (Ir.) Act, 1896. The interest on the purchase-money is made rent for the purpose of the section and, subject as therein mentioned, is to be paid to the person in receipt of the rent at the date of the agreement, or such other person as may prove himself entitled thereto. This company are neither mortgagees, assignees, nor trustees, nor do they fill any other position which would make them owners. The words of the section are equivalent to this.—It is rent for the purposes of the section, and must be paid to the person entitled to it, or who proves himself to be the owner of the rent. Those conditions do not exist here. Therefore, we must allow the appeal with such costs as are payable when the appellant appears in person, taking into account that he has been obliged to travel to Ireland.

FITZGIBBON, L.J.—The difficulty in the way

of Mr. Brown's clients which I cannot overcome is, that neither they nor the Land Commission, as the case now stands, can be brought within the terms of Deasy's Act, s. 20, so as to be justified to give a receipt for interest paid in lieu of rent which would be a full discharge to the sub-tenant against the tenant in respect of all rent so paid within the words of that section, and I can find no other authority for paying the appellant's money to the respondents.

APPEAL
Dec., 1908.
Jan., 1909.

HOLMES, L.J.—In reference to the admission made by Mr. Brown, that notice could not be served under s. 20 of Deasy's Act, I entirely agree with that view, and would have so decided. I would hold that the relation of landlord and tenant had ceased to exist and the section does not apply, and I think Mr. Brown was quite right in making the admission.

Solicitors for the respondents: *Wm. C. Hogan & Son.*

[*Note up on pp. 51 and 576 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before MEREDITH, M.R.)

SETTLED LAND ACTS AND LONGWORTH.

CHANCERY. Nov. 23, 1908.—*Land Purchase—Sale by*
Nov., 1908. *absolute owner—Will made after date of purchase*
agreement containing specific devise—Construction
—Conditional contract—Residuary legatee entitled
to proceeds of sale—Incidence of incumbrances.

On the sale of a small part of the Glynwood Estate under the provisions of the Irish Land Act, 1903, the vendor was absolute owner in fee-simple, and by his will, made subsequent to the lodgment of the purchase agreement, he devised "the Glynwood Estate" to his son, and appointed his wife residuary legatee. The vendor died before the advance applied for had been sanctioned. On a question being raised as to whether conversion had taken place in favour of the residuary legatee, on the ground that the lands sold having been specifically devised by a will made after the purchase agreement, and such purchase agreement being a conditional contract, the case fell within the rule laid down in Drant v. Vause and Emuss v. Smith, and therefore the devisee took all the interest, whatever it might be, of the testator in the lands and purchase-moneys :

Held, that, on the language of the will, the devise not being in fact specific and the intention being clear, the property had been converted as from the life-time of the testator, and the residuary legatee was entitled to the purchase-money and bonus subject to the payment only of a rateable part of the amount due on foot of certain charges common to the lands sold and other lands.

CHANCERY.

Nov., 1908:

Question arising on summons for a declaration. The vendor, Edward Travers Dames Longworth, who was the owner in fee-simple of lands of Ballysallagh, had entered into an agreement for sale direct to the tenant under the provisions of the Irish Land Act, 1903. The agreement for purchase was lodged with the Irish Land Commission on May 5, 1905, and the originating application on May 27, 1905. The vendor died on March 17, 1907, and subsequently the said lands were provisionally declared to be fit to be regarded as a separate estate, the purchase-advance was sanctioned, the final declarations made, and the purchase-money paid into the bank. An order having been made continuing proceedings in the name of Thomas Hussard Montgomery, as executor of Edward Travers Dames Longworth, the final schedule of incumbrances was ruled and the purchase-money allocated on May 14, 1908. The lands of Ballysallagh were, with other lands, belonging to the vendor, subject, among other incumbrances, to a mortgage dated July 22, 1902, from the vendor

CHANCERY. to Francis Dames Longworth and Thomas
Nov., 1908. Longworth Dames. By consent of all parties
interested, the residue of the purchase-money
and the bonus, amounting to £4,949 6s. 2d., was
allocated in payment off *pro tanto* of this
mortgage without prejudice to their rights
against the unsold lands. By his will dated
March 15, 1907, Edward Travers Dames Long-
worth devised to his son, Travers Robert, "the
Glynwood Estate and other properties in land
inherited by my father from John Longworth."
Having dealt with other parts of testator's pro-
perty, the will proceeds:—"I give and bequeath
to my wife all my personal property. I devise
and bequeath to my wife all the real residue and
remainder of my property, both real and personal,
and I appoint her residuary legatee and devisee
of this my will." The Glynwood Estate had
always included the lands of Ballysallagh and
other lands of considerable extent, large parts
of which had been sold and the purchase-moneys
received by the testator prior to the date of his
will. Travers Robert Dames Longworth being
an infant, an order was made on June 17, 1907,
in the Matter of the Settled Land Act and in the
Matter of the Conveyancing Act and Longworth,
appointing Francis Dames Longworth and Mansel
Longworth Dames trustees, for the purposes
of s. 42 of the Conveyancing Act, of the lands
so devised to the infant. The trustees having
been advised that the sale of Ballysallagh
effected a conversion, and that the purchase-

money and bonus passed as personalty to the residuary legatee, had a valuation made of the other lands, subject with Ballysallagh to common incumbrances, for the purpose of determining the incidence of such incumbrances. From this valuation it appeared that Ballysallagh, as between itself and such other lands, was only bound to contribute the sum of £1,056 0s. 6d. as its proportion of common incumbrances, and that the residuary legatee would be entitled to be recouped by such other lands the sum of £3,893 5s. 6d.—i.e., the difference between the sums of £4,949 6s. 2d. and £1,056 0s. 6d. Accordingly the trustees requested the mortgagees, under the said mortgage of July 22, 1902, to advance the sum of £3,893 5s. 6d. to the residuary legatee, and undertook if that was done to take such proceedings as might be necessary to sanction and secure this advance. In accordance with this request the mortgagees, on June 1, 1908, advanced the sum of £3,893 5s. 6d. to the residuary legatee. The trustees and mortgagees now sought a declaration that the mortgagees were subrogated to the rights of the residuary legatee, and that the lands remaining subject to this mortgage were well charged with the sum of £3,893 5s. 6d. and interest thereon at £4 per cent. as from the date of the advance of same.

CHANCERY.
Nov., 1908.

Leet, for the trustees and mortgagees, cited *London & South Western Ry. v. Gomm*, 20 Ch. D.

CHANCERY.

Nov., 1908.

962 ; *In re Sherlock's Estate*, [1899] 1 Ir. R. 561 ; *Doyle & Campion's Estate*, XII. Quart. Land Reps. 156, submitting that on these authorities, and on the true construction of the will, conversion had taken place ; that on the principle defined in *Patton v. Bond*, 60 L. T. 583, the mortgagees were, in the events that had happened, subrogated to the place of Mrs. Longworth, the residuary legatee, and that the correctness of the valuations made to determine the amount of the recoupment could, if necessary, be referred to Chambers.

Poole for the infant devisee by his next friend, Sir Augustine Baker.—The agreement for the sale of Ballysallagh, though binding inter parties, was, under the provisions of the Irish Land Act, 1903, conditional on the lands being declared by the Estates Commissioners fit to be regarded as a separate estate and on an advance of the purchase-money being sanctioned. That being so, the agreement for sale falls within the class of cases where, after an option to purchase or a conditional contract for sale has been created, the owner devises the property. If the property is specifically given after the contract has been entered into, the specific donee takes the property or the proceeds of sale in any event, and cited *Weeding v. Weeding*, 1 J. & H. 424 ; *Drant v. Vause*, 1 Y. & C. C. 580 ; *Emuss v. Smith*, 2 De G. & S. 722 ; *Lawes v. Bennett*, 1 Cox 167 ; *In re Pyle*, [1895] 1 Ch. 724 ; *Duffield v. M'Master*, [1896] 1 Ir. R. 370.

Leet, in reply.—The cases cited are mere options to purchase, where only one party is bound ; in sales under the Irish Land Act, 1903, both parties are bound, one to sell and the other to buy. Such a contract is conditional only in the same sense that all contracts are conditional on the purchaser being able to find the purchase-money and complete the contract. The present case is further distinguishable because the devise is not sufficiently specific, and, in any event, the testator's intention is clear.

CHANCERY.
Nov., 1908.

MEREDITH, M.R.—This case resolves itself into a question depending upon the true construction of the will of Edward Travers Dames Longworth. I see no reason to doubt he drew this short will himself, and I believe he meant the unsold portions of the Glynwood Estate to go to his son and the proceeds of sold lands to go to his wife, the residuary legatee. The cases of options to purchase cited by Mr. Poole, like *Drant v. Vause* and *Emmss v. Smith*, are conclusive so far as they go, but were decided on the facts of each particular case, on the particular language of the wills, and on the particular language and nature of the contracts. What Vice-Chancellor Page Wood says in *Weeding v. Weeding*, in reference to these two decisions, is incapable of misconstruction—"I understand the principle on which those cases were decided to be this : When you find that in a will made after a contract giving an

CHANCERY. option of purchase, the testator, knowing of the
Nov., 1908. existence of the contract, devises the specific
property which is the subject of the contract
without referring in any way to the contract he
has entered into, there it is considered that there
is sufficient indication of an intention to pass
that property, to give to the devisee all the
interest, whatever it may be, that the testator
had in it." But where a landlord and tenant
respectively buy and sell under the conditions
of the Irish Land Act, 1903, the view I take of
the case is that expressed in the clearest and most
unambiguous language by Mr. Justice Wylie
in *Doyle and Campion's Estate*. The case of
such a sale is a case in Court, and the proceeding
is one taken before the proper tribunal to have
its sanction given to the purchase agreement,
and is provisional on the Court declaring the
estate fit to be regarded as a separate estate,
and advancing the purchase-money. The Land
Purchase Acts prescribe what happens pending
the completion of the sale, and in particular
that interest on the purchase-money shall
immediately, as from the date of the purchase
agreement, become payable in lieu of rent. It
is a State transaction with a State buyer. The
testator in the present case had sold large portions
of the Glynwood Estate before his death under the
same Act, and had received the proceeds, and
applied them in discharge of incumbrances or
otherwise as part of his personal estate. His
will, indeed, purports to devise all the Glynwood

Estate, of which Ballysallagh originally formed part. But in fact it only dealt with a residue. And as regards Ballysallagh, he had sold it too, subject only to the sanction of the Court. The contingencies put in the cases are, no doubt, contingencies or options exerciseable by a third person or not; but where a man like the late Mr. Longworth goes to make his will, I have not the least doubt that he regarded the proceeds of Ballysallagh as personalty and not as realty. And his will expresses that intention as clearly as if the testator had expressly excepted the lands already completely sold, and also Ballysallagh, from the devise to his son, and expressly bequeathed to his wife the proceeds of Ballysallagh, which she would receive when the conditions of sale were fulfilled, the transactions completed, and the coping stone fixed on the edifice by the Court. On these conditions being satisfied, the performance related back to the lifetime of the testator, and the money representing the proceeds of the sale of Ballysallagh goes as personal estate to the wife and not as realty with the unsold portions of the lands to the devisee. The bonus, of course, in this case goes with the proceeds of sale. The mortgagees are entitled to stand in the shoes of the wife, and to be recouped in her place, and to have a declaration charging the unsold lands with such a sum as may be ascertained on an inquiry in Chambers to be the amount paid out of the proceeds of the sale in reduction of common

CHANCERY.

Nov., 1908.

CHANCERY. incumbrances in excess of the amount properly
Nov., 1908. and rateably payable by Ballysallagh, having
regard to its value and the value of such unsold
lands. All parties to have their costs.

Solicitors for the applicants: *A. & L. Good-
body.*

Solicitors for the respondent: *Baker, Ring-
wood & Gordon.*

[*Note up on p. 381 of Cherry and Wakely's
Land Acts, 3rd Edition, 1903.*]

KING'S BENCH DIVISION.

(Before PALLES, L.C.B., ANDREWS, JOHNSON and
BOYD, JJ.)

TRUSTEES OF CONGESTED DISTRICTS BOARD v.
CURRY.

Dec. 15, 1908.—*County Court—Ejection for non-payment of rent—Defendant not appearing—Affidavit to ascertain amount of rent due—Person qualified to swear such affidavit—Proof of tenancy and that plaintiff is landlord—Proof of character of holding.*

KING'S
BENCH.
—
Dec., 1908.

In an action of ejection for non-payment of rent in the County Court the defendant did not take defence or appear, and the plaintiffs claimed a decree for possession under the default procedure in the County Court; upon proof of the service of the civil bill and production and lodgment of an affidavit under s. 46 of 27 & 28 Vict., c. 99:

Held, that such an affidavit could only be received for the purpose of proving the amount of rent due, and that further proof must be given in the ordinary way, at the hearing, that the premises were held from the plaintiff as landlord under an existing contract of tenancy. An affidavit which describes the deponent as "the clerk in charge of the Collection Branch of the Congested Districts Board for Ireland, the plaintiffs in the above civil bill ejection," does

KING'S
BENCH.
Dec., 1908.

not sufficiently show the deponent to be a person qualified to make an affidavit under the said s. 46.

Quære, whether in cases in which it appears from the civil bill process that the case is within the provisions, as to execution, of s. 7 of 50 & 51 Vict., c. 33, it is not also necessary to prove that the holding is agricultural or pastoral, or partly agricultural and partly pastoral.

Special case stated by Kenny, J., Judge of Assize, at the Summer Assizes, 1908, for the County of Mayo :—(1) This appeal came before me at the Mayo Assizes, at Castlebar, on July 14, 1908, the plaintiffs being the appellants from a dismiss without prejudice given by County Court Judge Morphy, at Swinford, on April 1, 1908. (2) The action was one of ejectment for non-payment of rent; the defendant did not take defence or appear, and the plaintiffs claimed a decree for possession under the "default" procedure in the County Courts on the production of an affidavit showing the amount of rent due to the plaintiffs. (3) The dismiss was not taken out, but I annex a copy of the civil bill process and a certificate of the Clerk of the Crown and Peace showing that the dismiss was granted. (4) I also annex a copy of the affidavit of Edgar A. Barton, an official of the plaintiffs, deposing to the amount of rent due to the plaintiffs. (5) Mr. Coll appeared for the plaintiffs before me. There was no appearance for the defendant. From Mr. Coll's statement it appeared that considerable

controversy has arisen as to the jurisdiction of the County Court Judge to make a decree for possession in cases of non-payment of rent in default cases where no proof is tendered save such an affidavit as that which I have annexed showing the amount of rent due. The question arose in other cases before Mr. Justice Wright, at the Summer (1907) Assizes, and again before Mr. Justice Dodd, at the Spring Assizes, 1908. Both judges held that the plaintiffs were entitled to a decree for possession on production and lodgment of such an affidavit as I have mentioned, without any other evidence, oral or documentary. Before Mr. Justice Dodd gave his decision he had been furnished with a memorandum by the County Court Judge giving his reasons for holding that a decree could not, under the circumstances, be granted. Mr. Justice Dodd delivered a considered judgment. Subsequently to the delivery of the judgment the question again came before Judge Morphy, in April, 1908, in a case of the *Trustees of the Congested Districts Board v. Derrig*, when he declined to follow the decision of the Judges of Assize, and delivered a judgment going very minutely into the reasons which influenced him in so doing. The present case, in which Bridget Curry is defendant, he also dismissed, and the appeal was taken with a view to having an authoritative decision on the point, and settling once for all the procedure in such cases, which is now in a position of uncertainty. (6) I have directed that there shall

KING'S
BENCH.

Dec., 1908.

KING'S
BENCH.
Dec., 1908.

be lodged with this case (a) a copy of Judge Morphy's memorandum; (b) a newspaper report of Mr. Justice Dodd's judgment; and (c) a newspaper report of Judge Morphy's judgment. (7) This being a mere question of procedure and jurisdiction there are no facts for me to find save as hereinbefore set forth. (8) The question for the Court is—whether the plaintiffs were entitled to a decree for possession on production and lodgment of the aforesaid affidavit and without any further evidence? If the question be answered in the negative the dismissal is to be affirmed without costs of appeal. If in the affirmative the dismissal is to be reversed and a decree for possession made with costs in the Court below. The form of the civil bill was the ordinary one in the case of an ejectment for non-payment of rent of an agricultural holding. The affidavit lodged was by a civil servant who swore:—"I am the clerk in charge of the Collection Branch of the Congested Districts Board for Ireland, the plaintiffs in the above civil bill ejectment for non-payment of rent, for recovery of possession of all that and those that part of the lands of Derryfinlough, situate in the parish of Killedan, barony of Gallen, in the division of Swinford, and County of Mayo, held by the defendant, Bridget Curry, as tenant to the plaintiffs, for a judicial term, at the yearly rent of £1 2s., payable half-yearly, on every first day of May and first day of November in each year." The affidavit went on

to state that there was still due and owing to the plaintiffs out of the said premises the sum of £3 6s., for one year's rent and arrears up to Nov. 1, 1907, and that every person in occupation of the premises as tenant and under tenant had been served. The County Court Judge, in the above-mentioned memorandum, after referring to 56 Geo. III., c. 88, s. 7; 58 Geo. III., c. 39, s. 3; 14 & 15 Vict., c. 57, ss. 83, 88; and 23 & 24 Vict., c. 154, s. 104, proceeds :—" After 1860 all the essential averments in an undefended civil bill ejectment for non-payment of rent should be proved in exactly the same way as if the ejectment were defended, and so the practice remained until 1864, when 27 & 28 Vict., c. 99, was passed, of which s. 46 is as follows. [Sets out s. 46.] It is contended for the landlords that an affidavit under this section in an ejectment for non-payment of rent dispenses with the necessity for any other proof save that of service of the civil bill. I am unable to give such an effect to the affidavit. I receive it for the purpose of proving or ascertaining the amount of the rent due, but I hold that the other averments in the civil bill, as to nature of tenancy, right of person seeking to maintain the ejectment, &c., must be proved in the ordinary way by oral or documentary evidence as the case may be. See the averments contained in the forms of ejectment for non-payment of rent prescribed by the rules of March 13, 1897, made in pursuance of s. 12 of the Land Law (Ir.) Act, 1896." The County Court Judge concluded

KING'S
BENCH.

Dec., 1908.

KING'S
BENCH.
Dec., 1908.

by stating that he made such memorandum because, as the case was undefended, there was no person to discuss it before the Judge of Assize, and it was very desirable that the practice of the Court should be authoritatively declared in accordance with the law.

O'Brien, K.C., and *Coll* appeared on behalf of the plaintiffs on the case stated.

PALLES, L.C.B.—The question reserved for us by Kenny, J., is whether the plaintiffs were entitled to a decree for possession on production and lodgment of an affidavit mentioned in the case stated. I am of opinion that they were not. The civil bill was one of ejectment for non-payment of rent. It was headed Land Law Act, and was in Form 3 (A) prescribed by Or. XXIII. (A) of the Rules of March 13, 1897. These rules are confined to ejectments of holdings which are agricultural or pastoral or partly agricultural and partly pastoral, so that I will assume that the holding is of that character. The affidavit purports to be sworn under 27 & 28 Vict., c. 99, s. 46, and, though the question arises whether it is sufficiently shown that the deponent is the person authorised to make such affidavit. I will assume, for the purpose of this judgment, without deciding the point, that he is so qualified. The defendant did not appear on the hearing of the civil bill, and under these circumstances the plaintiffs contend that under the joint operation of that section and s. 54 of the Landlord and

Tenant (Ir.) Act, 1860, they were entitled to a decree without proving the contract of tenancy. I do not agree. The jurisdiction to bring such a proceeding in the County Court is conferred by s. 52 of the Act of 1860, and is limited to cases in which a year's rent is in arrears in respect of lands held under "any fee-farm grant, lease or other contract of tenancy, or from year to year, and whether by writing or otherwise," and therefore, unless some other provision exists to qualify this section, proof of the grant, lease, or other contract of tenancy would be essential. The plaintiffs, however, contend that there is a qualification contained in s. 54 of the same Act. That section is as follows. [Reads s. 54 of 23 & 24 Vict., c. 154.] The plaintiffs contend that, the service having been proved, and it being proved by the affidavit that upwards of a full year's rent (not exceeding £100) was due when the proceeding was commenced, and is still due, the provisions of the section have been satisfied. This section applies to both defended and undefended cases, and if the plaintiffs' contention is correct the County Court Judge would have jurisdiction to grant a decree on a witness for the plaintiffs proving that not less than one year's rent was due without any proof being given that the plaintiff was the person entitled to receive such rent, and without even proving that a tenancy existed. Mr. O'Brien insists that we are coerced by the words of the section to come to this conclusion, but I cannot agree.

KING'S
BENCH.

Dec., 1908.

KING'S
BENCH.

Dec., 1908.

I read s. 52 and s. 54 together, and when read together they appear to me to be perfectly consistent. The first portion of s. 54 is now repealed, but that repeal cannot affect the construction of the unrepealed portion. The repealed portion enacted that every civil bill for ejectment for non-payment of rent under the Act of 1860 might be according to Form No. 2 in Schedule A. of the Act, which form alleged that the defendant [or one of the defendants] held the lands as tenant thereof to the plaintiff under a lease [or contract of tenancy] for a term unexpired [or as tenant from year to year, as the case might be] at a specified yearly rent, and that one full year's rent was due to the plaintiff in respect of such lands. In my opinion the one full year's rent in s. 54 means the full year's rent mentioned in the civil bill—namely, one year of the rent at which the lands are held by a tenant to the plaintiff under the lease, contract of tenancy, or tenancy from year to year mentioned in Form No. 2—therefore the proof required by s. 54 necessarily involves proof of a tenancy, for if there was no tenancy the sum of money could not be due as rent, nor due to the plaintiff as landlord. Also, the jurisdiction of the County Court Judge is to decree the said landlord (not the plaintiff) to be put into possession of the lands. I am therefore clearly of opinion that it is necessary, in order to give jurisdiction, to prove not only that the sum of money is due, but strictly that it is due for rent, and therefore it must be proved

that there was a contract under which it became payable out of the lands, and since the landlord and not the plaintiff is the person the section declares is to be put into possession, evidence must be given to show who the landlord is. Mr. O'Brien argued that the statement in the affidavit that the rent was due to the plaintiffs could only be accurate if the sum was due under a contract of tenancy under which the lands were held from the plaintiffs. In a sense this is true, but this inferential proof of a tenancy under the plaintiffs is, in my opinion, not sufficient to satisfy s. 46 of the Act of 1864. According to that section the affidavit is admissible merely for the purpose of ascertaining the amount of the rent due, and is not admissible for the purpose of proving the existence of the lease or contract of tenancy, the former of which should be and the latter might be in writing, and therefore not provable by affidavit. Furthermore, the section is *in pari materia* with a long series of similar enactments beginning with 11 Anne, the first Irish statute which gave a right to eject for non-payment of rent independent of an ejectment on a forfeiture for a broken condition. Section 2 enacts. [Reads s. 2.] The concluding portion of that section gives the lessee a right in equity to relief against a forfeiture which has taken place in the event of his filing a bill within six months and paying the rent in arrear. The mode of ascertaining the amount of rent due, as distinguished from proving that the amount necessary

KING'S
BENCH.
Dec., 1908.

KING'S
BENCH.

Dec., 1908.

to maintain the action was due, related to the right of the tenant to redeem, and in the case of judgment against the casual ejector corresponding to the present judgment by default the proof by affidavit was after and not before judgment was marked. It may be necessary to consider another matter in some future case, though it is not necessary for our decision here. Section 7 of the Act of 1887 changes the form of execution in cases such as the present, and, as the execution is in the Civil Bill Court made part of the judgment, it might be argued that evidence was necessary at the hearing to show that the case was within the section authorising the particular execution. In the present case, owing to the heading of the ejectment process, the execution could only have been directed in conformity with that section, and to authorise such execution it may be argued that proof should be given that the case falls within that section. It may possibly be that, though the form of the process estops the plaintiff from contending that the case is not within the section, the defendant, though not appearing, is not so estopped, and therefore it may have been necessary to give some evidence that the holding was agricultural or pastoral or partly agricultural and partly pastoral. In certain cases another point might also arise under the Act of 1896. Section 12 of that Act may possibly, in cases where it appears that there is more than one person in possession, require some proof to be given as to the character of the

possession of such persons. It is not, however, necessary for us to decide these points now. The question submitted to us will be answered in the negative, and therefore the dismiss must be affirmed. I may say, though we do not in any way base our judgment on it, that, in the opinion of all of us, the affidavit does not sufficiently show that the deponent is a person qualified to make the affidavit.

KING'S
BENCH.

Dec., 1908.

Solicitor for the plaintiffs : *J. O'Connor.*

[*Note up on pp. 110 and 407 of Cherry and Wakely's Land Acts, 3rd Edition, 1908.*]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the EVICTED TENANTS (IR.) ACT, 1907, and the Estate of DAVID E. YOUNG, the supposed Owner of Lands.

LAND
COMMISSION.
Dec., 1908.

Dec. 1, 1908.—*Evicted Tenants Act—Compulsory acquisition of lands—Whether tenanted or untenanted—Fee-farm grantee in actual occupation—Questions of law before Judicial Commissioner—Costs.*

Lands which are actually occupied by a fee-farm grantee are tenanted lands within the meaning of s. 1 (3) of the Evicted Tenants (Ir.) Act, 1907, and cannot be acquired compulsorily for the purposes of the said Act.

The costs of arguments on questions of law arising under the Evicted Tenants Act, and submitted under s. 23 of the Act of 1903 to the Judicial Commissioner, may be allowed to owners of lands which the Estates Commissioners have proposed to acquire.

Question of law arising under the Evicted Tenants (Ir.) Act, 1907, submitted for the decision of the Judicial Commissioner under s. 23 of the Irish Land Act, 1903. The facts, as set forth in the memorandum, were as follow:—Upon Jan. 14, 1908, the Estates Commissioners

published in the *Dublin Gazette* a notice under the Evicted Tenants Act to the effect that they proposed to acquire compulsorily part of the lands of Derrymoney South, in the County of Galway, containing about 453a. 2r. 14p., statute measure, and a copy of the said notice was served on David E. Young, the owner and occupier of the said lands, on Jan. 18, 1908. David E. Young was in actual occupation of the lands under an indenture of fee-farm grant dated Oct. 31, 1868, made in pursuance of the Renewable Leasehold Conversion Act, at a yearly rent of £44 14s. 1d. The said David E. Young contended that he was a tenant of the said lands within the meaning of the Land Purchase (Ir.) Acts, including Part I. of the Irish Land Act, 1903, with which the Evicted Tenants Act is, by s. 20 thereof, directed to be construed as one, and that the lands were tenanted lands within the meaning of the Evicted Tenants Act, and that by reason of their being tenanted lands the Estates Commissioners had no jurisdiction to acquire the same compulsorily for the purposes of the said Act. It was admitted by the Estates Commissioners that if the said lands were tenanted lands within the meaning of the Act they had no jurisdiction to acquire the same compulsorily. The following question of law was submitted:—Are the said lands tenanted lands within the meaning of the said term in s. 1 (3) of the Evicted Tenants (Ir.) Act, 1907 ?

LAND
COMMISSIONERS.
Dec, 1908.

LAND
COMMISSION.
Dec., 190

Meredith, K.C., and Wylie for the Estates Commissioners, referred to Evicted Tenants (Ir.) Act, 1907, s. 1 (1), (3). By s. 15 it is provided that the Land Purchase Acts shall apply. The person selling the land is constructive vendor and the Land Commission is constructive purchaser. Section 20 further provides that the Evicted Tenants Act shall be construed as one with Part I. of the Irish Land Act, 1903. By the Act of 1903 all land is separated into two classes, tenanted land and untenanted land, so called in s. 8 of the Act of 1903. Tenanted and untenanted are relative terms. The word tenanted in s. 1 (3) of the Evicted Tenants Act cannot be read in strict technical sense (Foa, Landlord and Tenant, paragraph 1), it must be construed in the light of the Land Purchase Acts. What is the sense in which the word is used in the Acts of 1903 and 1907? We say it means tenanted relatively to vendors or constructive vendors. Those who would be actual vendors under the Act of 1903 are constructive vendors under the Act of 1907. Under the Landlord and Tenant (Ir.) Act, 1870, owners in fee-farm are enabled to sell land as absolute owners. Relatively to the owner here the land is untenanted. He could sell under the Act of 1903, s. 8.

[WYLIE, J.—How could he sell except under the Redemption of Rent Act, 1891? Apart from s. 8, could he insist on redeeming the rent under the Land Purchase Acts?]

It was held in *White's Estate*, XI. Quart. Land Repts. 15; [1906] 1 Ir. R. 186, that untenanted land could be sold under ss. 6 and 7. LAND COMMISSION. Dec., 1908.

[WYLIE, J.—You are compulsorily redeeming the landlord and preventing the Redemption of Rent Act from operating.]

The Redemption of Rent Act deals with fixing a fair rent or purchase by a tenant from his landlord. There must be redemption or a fair rent must be fixed.

[WYLIE, J.—That is so, but the rent cannot be redeemed without the landlord's consent.]

By s. 6 of the Act of 1903 the lands can be sold though no tenants are on the lands. The Redemption of Rent Act does not affect the question. Tenanted means tenanted relatively to a person who can sell. This land is not tenanted relatively to Young.

[WYLIE, J.—If s. 8 of the Act of 1903 entitles this man to sell you keep out the Redemption of Rent Act. If he holds the land at a rent, the Act of 1896 brings him within the Redemption of Rent Act? Show me any clause which enables you to disturb any tenant except a new tenant?] If the fee-farm grantor cannot prevent the owner from selling under s. 8 of the Act of 1903 the Estates Commissioners can compel the owner to sell under the Evicted Tenants Act.

Conner, K.C., and Boyd, for the owner of the lands, were not called on.

LAND
COMMISSION.
Dec., 1908.

WYLLIE, J.—The Court of Appeal held that s. 8 of the Act of 1903 really dealt with small parcels of land necessary for facilitating the resale and redistribution of estates. I have no doubt in the case at all, as it seems to me that the meaning of s. 1 (3) of the Evicted Tenants Act is clear, and that *untenanted* means “not in the occupation of a tenant within the meaning of the Land Purchase Acts.” As this land is occupied by a tenant within the meaning of the Land Purchase Acts, it cannot be taken under the compulsory powers of the Evicted Tenants Act. I answer the question—Yes.

Conner, K.C.—We are entitled to costs. In *Lord Clanricarde's Case*, [1908] 1 Ir. R. 433 ; XIII. Quart. Land Reps. 200, the Court of Appeal gave costs. It is not an ordinary case under s. 23 in which the Court has no jurisdiction to give costs, there being no fund to meet them. Section 5 (3) of the Evicted Tenants Act provides that costs be paid as part of the expenses of the Land Commission.

Meredith, K.C.—This is a case coming under the advisory jurisdiction of the Judicial Commissioner. In *Lord Clanricarde's Case* the Court of Appeal gave the costs of the appeal, but they did not give the costs in this Court.

Conner, K.C.—The point is whether we are entitled under s. 5 (3) of the Evicted Tenants Act, 1907.

Meredith, K.C.—The power under which this

case was submitted for the opinion of the Court was the power given by s. 23 of the Act of 1903, which the Act of 1907 enabled the Commissioners to make use of in this case.

LAND
COMMISSIONER.
Dec., 1908.

WYLIE, J.—Is there anything in s. 5 (3) of the Evicted Tenants Act to prevent me from giving costs? Ordinary cases under the Act of 1903 are all voluntary proceedings. This case arises in consequence of compulsory proceedings brought by you, and costs are expressly provided for by the Evicted Tenants Act. It is quite distinct from an ordinary Land Purchase case. The owner of the lands is entitled to his costs.

Solicitor for the Estates Commissioners :
William Alexander.

Solicitor for the Owner : *William Fry.*

[*Note up on pp. 1063, 1066, and 1081 of Cherry's Irish Land Act, 1903.*]

LAND COMMISSION.

(Before FITZGERALD, J.)

TRUSTEES OF THE CONGESTED DISTRICTS BOARD FOR IRELAND (Landlords); WILLIAM MAIRS, limited administrator of BRIDGET SWEENEY, deceased, lately holding in conjunction with FRANCIS MORAN (Tenant).

LAND
COMMISSION.
Dec., 1908.

Dec. 7, 1908.—*Land Law Acts—Practice—Pre-emption by landlord—Conjunct tenancy—Assignment to landlords by limited administrator of tenant—Purchase and entry into possession by third party after service of notice to pre-empt—Order directing sheriff to put landlords in possession.*

Notice of intention to sell as personal representatives was served by two of the next-of-kin remaining in possession after the death of the tenant of portion of a holding, and the landlords exercised their right of pre-emption. After service of the prescribed notice by the landlords, the next-of-kin purported to sell the lands to C., who went into possession. An assignment to the landlords was subsequently executed by the limited administrator of the deceased tenant, but C. refused to give up possession. On the application of the landlords an order was made that the sheriff give, or cause to be given, to the landlords full, just, and peaceable possession of the lands.

Motion on behalf of the landlords for an order directing the sheriff of County Mayo to put them or some person on their behalf in possession of that part of the land of Carrowsallagh, in the Rural District of Westport, and County of Mayo, until recently occupied by the representatives of Bridget Sweeney, and upon which the true value was fixed by order dated Nov. 1, 1907. By order of the Sub-Commission, dated June 18, 1907, William Mairs had been appointed administrator of the personal estate of the said Bridget Sweeney limited to the purposes of the Land Law Acts. The following facts appeared from an affidavit sworn by the said William Mairs:—Francis Moran and the said Bridget Sweeney, deceased, were conjunct tenants of a holding in the townland of Carrowsallagh, containing 55 acres 2 roods 26 perches statute measure or thereabouts, subject to a yearly rent of £5 3s. The said Bridget Sweeney had been in exclusive occupation of portion of the said holding, containing 14 acres 1 rood 17 perches, for which, together with an undivided one-third of 15 acres 0 roods 15 perches, she contributed £1 14s. 4d. towards the rent of the holding. The said Francis Moran was in exclusive occupation of portion of the said holding, containing 26 acres 0 roods 34 perches, together with the remaining undivided two-thirds of the said 15 acres 0 roods 15 perches, contributing £3 8s. 8d. towards the rent. The trustees of the Congested Districts Board for Ireland were owners.

LAND
COMMISSION—
Dec., 1908.

LAND
COMMISSION.
—
Dec., 1908.

in fee of the estate of which the said holding formed a part. On May 30, 1907, Mary Sweeney and Myles Sweeney, claiming to be the representatives of the said Bridget Sweeney, served on the trustees notice of their intention to sell, and on failure to agree as to price the trustees served notice to fix the true value. By order of the Land Commission, dated Nov. 1, 1907, the true value of the tenancy of the holding of the said Bridget Sweeney was fixed at £40, and by indenture dated May 29, 1908, the said William Mears, as such limited administrator as aforesaid, in consideration of £40, surrendered and assigned unto the trustees all that part of the lands as formerly in the occupation of Bridget Sweeney, deceased, to the intent that the tenancy interest should merge and be extinguished in the freehold, and by the same indenture the said Francis Moran covenanted for the payment of his proportionate part of the rent for that portion of the lands retained by him. On May 18, 1907, the said Mary Sweeney and Myles Sweeney went to America, leaving William Chambers in possession of the house and lands, and the said William Chambers was still in possession, claiming under an alleged agreement to purchase, made between him and the said Mary Sweeney and Myles Sweeney. The rent up to May 1, 1908, amounting to £1 17s. 9d., had been paid to the trustees by the said William Mairs, and the balance of the said sum of £40 had been lodged in Court. It was alleged on behalf of William Chambers that

Myles Sweeney, deceased, the husband of Bridget Sweeney, deceased, had been tenant of the lands, and on his death had left him surviving his widow, the said Bridget Sweeney, and four children, of whom the said Myles Sweeney and Mary Sweeney had always resided on the holding and worked it with their mother. It was further alleged that the said William Chambers had purchased the holding for a sum of £50 (for which sum a receipt was produced, dated May 11, 1907), and that he had no notice of any proceedings or intention on the part of the landlords to take up the lands until he received a letter, dated June 11, 1908, from the Congested Districts Board requiring him to deliver up possession.

LAND
COMMISSION.
D C., 1908.

Dudley White for the Congested Districts Board.—Section 1 of the Land Law (Ir.) Act, 1881, applies to the sale of portion of a holding, and the landlord has the right of pre-emption as to such : *Murtagh v. Allen*, 27 L. R. Ir. 118. After service of a notice to pre-empt, it is not competent to a tenant to sell to another person pending the hearing of the application to fix the true value, and the sale to Chambers was consequently inoperative : *Connor v. Gentleman*, 18 Ir. L. T. R. 28. Under the powers given to the Land Commission by s. 48 (3) (d) of the Land Law (Ir.) Act, 1881, there is jurisdiction to make the order sought for directing the sheriff to put the landlords into possession : *Fawcett v. M'Kelligett*, 33 Ir. L. T. R. 71.

LAND
COMMISSION.
—
Dec., 1908.

FitzGerald Kenny for William Chambers—
Fawcett v. M'Kelligett does not apply. The order there was made against a party to the proceedings. Chambers has been a stranger to these proceedings. The widow was only entitled to one-third, and Myles and Mary were, in their own right, entitled to two-thirds : *Martin v. Kearney*, VII. Quart. Land Reps. 18. The Congested Districts Board at best are only entitled to one-third. They got no better title than the assignor had to give : *Clarke v. Taylor*, [1899] 1 Ir. 449, 456. In an action of ejectment, they could only succeed as to one-third.

FITZGERALD, J.—Mary Sweeney and Myles Sweeney, describing themselves as personal representatives, served notice of their intention to sell, and the effect of the notice to fix the price served on them by the Congested Board was to make the Congested Districts Board purchasers in fact at a price to be named. Chambers had notice of the proceedings before the sale to him. The question is, whether I should exercise the ordinary and usual practice in the case of a sale. Mr. Kenny argues that to grant this application would shut out Chambers from setting up his title. In my opinion he has no title. He purchased from Mary Sweeney and Myles Sweeney as the personal representatives of their mother, Mary Sweeney ; they would not be listened to if they claimed any other possession

than as such personal representatives, and Chambers cannot be in any better position.

LAND
COMMISSION.
Dec., 1908.

The curial part of the order made was as follows :

“ Order that the sheriff of the County Mayo do, and he is hereby required and commanded, immediately after sight or receipt hereof, to go to that part of the lands of Carrowsalagh, containing 14 acres 1 rood 17 perches, or thereabouts, together with an undivided one-third of 15 acres 0 roods 15 perches of the said lands, situate in the Rural District of Westport and County of Mayo, being the lands the subject of these proceedings, and without delay to give or cause to be given to the landlords, the trustees for the Congested Districts Board for Ireland, the full, quiet, and peaceable possession of the said part of said lands as aforesaid, with all and singular the appurtenances. And the Court doth order that the fund in Court standing to the credit of the cash account of the Irish Land Commission and separate credit of the account entitled ‘ Landlords, the Trustees of the Congested Districts Board ; Tenant, William Mairs, limited administrator of Bridget Sweeney, deceased, late in company with Francis Moran,’ be not paid out of court without notice to the landlords and to the said William Chambers. And the Court doth declare the landlords are entitled to be paid out of the funds in court the sum of £2 2s. as and for their costs of this motion. And the Court doth reserve liberty to the said

**LAND
COMMISSION.**

William Chambers to apply to have the fund remaining in court paid out to him."

Dec., 1908.

Solicitor for the Congested Districts Board :
J. O'Connor.

Solicitor for William Chambers : *J. C. Robertson.*

[*Note up on pp. 233, 241, and 336 of Cherry and Wakely's Land Acts, 3rd Edition, 1903.*]

LAND COMMISSION.

(Before WYLIE J.)

In the Matter of the Estate of FRANCIS L. WHITE
AND ANOTHER.

Nov. 10, 26, 1908.—*Evicted Tenants (Ir.) Act, 1907—Compulsory purchase—Price fixed by Estates Commissioners—Appeal against—Method of ascertaining—Bonus.* LAND
COMMISSION.
Nov., 1908.

In the case of a compulsory sale of lands under the Evicted Tenants (Ir.) Act, 1907, the Estates Commissioners offered to the owner a sum of £1,450. The vendor appealed on the ground of insufficiency of price and claimed to be entitled to a sum of £2,000 :

Held, that the price offered by the Estates Commissioners was the full value, and that the appeal should be dismissed. Principles of valuation in cases under the Evicted Tenants Act stated.

The Estates Commissioners are bound to estimate the value without regard to any bonus to which the vendor may be entitled.

The facts sufficiently appear from the judgment.

Herbert Wilson, K.C., for the vendor.

LAND
COMMISSION.
Nov., 1908.

WYLIE, J.—This is an appeal from the Estates Commissioners under the Evicted Tenants Act, as to the price fixed by them for land taken under their compulsory powers. The case is a rather curious and interesting one. Three different inspectors independently valued the land at £1,036, £1,188, and £1,267 respectively. An offer to buy at each of these prices was made, and all were refused, and, after a hearing by the Estates Commissioners on the owner's petition, they increased their offer to £1,450, which the owner still considers too low. The evidence of value produced before me by the owner consisted first of the evidence of Mr. Garby, a valuer, who estimated the value at £2,000, which he arrived at by three different methods. The first two methods are based upon £80 being what he calls a second term fair rent for the land. I do not know exactly what he means by a second term fair rent for untenanted land, and I think his third method gives me more assistance in arriving at the value of the land. He says the land would carry sixty two-year old cattle which would give a gross profit of £2 10s. per head, or £150 in all. Then he deducts £30 for herd, £30 for 4 per cent. on capital, £10 for rates and taxes, and £10 for sundries, leaving a net profit of £70 per annum, and then he says it would take £2,000 to produce this income at $3\frac{1}{2}$ per cent., and he fixes £2,000 as the value of the land. In other words, he bases his value on the assumption that a precarious

income of £70 per annum derived from the grazing of land is as well secured as the same income derived from $3\frac{1}{2}$ per cent. securities. I need hardly say that in that assumption I do not agree. Capt. White, who has been working the land himself for three or four years as grazing land, fixed the net annual profit at about the same figure as Mr. Garby. Mr. Brown, the land agent, was also examined for the owners, and he valued the land at £2,000. He did not, however, inspect or value the land itself; but based his figures on a comparison of the judicial rents of other holdings on the estate with the Government valuation of the same, and by that means came to the conclusion that £83 10s. would be the fair second term rent of this land, a conclusion to which I can attach no weight for the present purpose. Now, assuming for a moment the correctness of the estimate made by Capt. White and his valuer—viz., that the land if used for grazing purposes (being the purposes for which it is most suitable) would produce an annual net profit of £70—what would be the capital value of that annual profit? Mr. Garby seemed to think that the owner was entitled to such a sum as would, if invested at $3\frac{1}{2}$ per cent., give him that income. It is now well settled that he has no such right. If we apply to this the same rule that we apply in fixing the redemption price of a superior rent his right is to be measured by such a sum as when invested would produce an equal income equally well secured,

LAND
COMMISSION.
Nov., 1908.

LAND
COMMISSION.
—
Nov., 1908.

together with something added for compulsory purchase. Now, suppose the land was put up for sale, and it was stated in accordance with the figures which Mr. Garvey has given me that if used for grazing purposes, for which it is suited, it would produce a net annual profit of £70, how many years purchase of that annual profit would it bring? Is there any income more precarious than that derived from a grazing farm? Would the securing of that income rank with a $3\frac{1}{2}$, 4, $4\frac{1}{2}$, or 5 per cent. security? In my opinion it would rank much nearer 5 per cent. than any of the others, and, therefore, I think twenty to twenty-one years' purchase, or £1,400 to £1,470, would be its full value on the above basis of income. But as the three inspectors differed so much from each other as to the value of this land, and all differed so much from the value proved on behalf of the owner, I thought it advisable in this case to obtain the assistance of another valuer of whose capacity, knowledge and impartiality I have had ample experience, and I accordingly sent down Mr. Cunningham, who is entirely independent of the Land Commission, to inspect and value the land. Mr. Cunningham, after a careful inspection sent in his report, which I had afterwards an opportunity of fully discussing with him. According to Mr. Cunningham the annual value of the land is £61 10s. 7d., and by that he means what is now well known as the gross fair rent of land and buildings as they now

stand in the owner's hands, the occupier paying all rates and taxes and maintaining the premises; and Mr. Cunningham is of opinion that the land is worth twenty-three or twenty-three and a half years' purchase of that annual value, or from £1,415 to £1,445. In my opinion twenty-three and a half years' purchase of a rent of that character is a liberal price, and having considered carefully all the valuations as well as the evidence given by the owner, I think the last offer made by the Estates Commissioners of £1,450 is the full value of the lands, and, therefore, I dismiss the appeal.

LAND
COMMISSION.
Nov., 1908.

Wilson, K.C., asked for a direction that the vendor was entitled to the bonus.

WYLIE, J.—My view is that you are entitled to the bonus. The Estates Commissioners should give the full value of the lands, ascertaining it without regard to the question of bonus, and I have so directed them.

Solicitors : *Wm. Roche & Sons*.

[*Note up on pp. 1056 and 1117 of Cherry's Irish Land Act, 1903.*]

IRISH LAND COMMISSION.

LAND PURCHASE ACTS.

DIRECTIONS.

DISPENSING WITH NOTICE OF VOUCHING AND ALLOCATION.

1. When there is more than one allocation in respect of the purchase-money of land the subject matter of any one Originating Application or Request, the Examiner may dispense with the service of notice of a second or any subsequent vouching or allocation on any appearance party whose name appears as a claimant on any final schedule of incumbrances or allocation schedule in the same Estate, and whose claim or claims appearing on such schedule of incumbrances or allocation schedule has or have been finally disallowed or satisfied in full on a previous allocation.

VOUCHING OF TITLE TO SUPERIOR INTERESTS.

Affidavit of Title.

2. The affidavit prescribed by Rule 16 of Order XX. of the Rules dated 16th March, 1897, and the directions therein referred to, should be made by the claimant, unless he be under disability, in which case it may be made by his Solicitor, but, if the superior interest is the subject matter of a settlement within the meaning of the Settled Land Acts, 1882 to 1890, the affidavit may be made by the person entitled in possession under such settlement. The affidavit should state, in addition to the matter prescribed by the aforesaid directions, all claims, whether in the nature of superior interests, charges or incumbrances, affecting the superior interest to which title is being shown, or the redemption price thereof, and should specifically negative the existence of any other such claim, or, if there be no such claim, the fact should be deposed to. If the redemption

price, or any part thereof is payable to the deponent, or to the trustees of a settlement under which he is beneficially entitled, the affidavit should contain an averment that the deponent, or the trustees, as the case may be, are entitled to payment.

When Affidavit should be made.

3. When, by reason of the value of the superior interest exceeding £100, and title not having been shown in the course of prior proceedings, the affidavit is in the nature of an epitome of title, it should be lodged with the Examiner as soon as possible after the rulings on title to the estate have been issued, provided the purchase money of such estate has been paid into the Bank of Ireland, or the estate vested in the Land Commission or Congested Districts Board, as the case may be. In all other cases the affidavit should be produced on the general vouching, due notice of which is given to the owner of the superior interest to enable him to prove his claim in full, and not merely to enable him to have arrears paid, and a sum retained for costs. The filing of the affidavit should not be postponed until redemption has been ordered, when the superior interest is of such a nature as will necessarily be satisfied by the payment of a capital sum.

PROCEEDS OF SALE BY THE LAND COMMISSION OF A
HOLDING WHICH IS SUBJECT TO A PURCHASE
ANNUITY.

4. When the sum realised by the sale is in excess of the sum due to the Land Commission the Solicitor to the Land Commission shall forthwith obtain an office copy of the folio of the Register of Titles evidencing the title to the holding as such folio stood at the date of such sale, and, when he has obtained the order for payment of all moneys due to the Land Commission, he shall transmit such office copy of the folio to the Examiners' Office together with a form to be called "The Solicitors' Schedule" specifying the date of the sale, the amount realised, the particulars of the payments made, the amount of the surplus, the date on which the advance in respect of which the purchase annuity was created was made, the name of the person to whom such advance was made, the amount of the advance,

and the record number and title of the Matter or Estate in which such advance was made. The Solicitor's Schedule shall be signed by the Solicitor to the Land Commission, or by an Assistant Solicitor.

5. The Solicitor to the Land Commission shall without delay notify the amount of the surplus proceeds to all such persons as may appear from the Register of Titles or otherwise to be likely to be entitled to or interested in such surplus, and refer them to the Rules which prescribe the procedure towards obtaining payment out of Court.

6. Should a search in the Registry of Deeds be necessary the Examiner may accept a common search, and, if title is being shown to a yearly tenancy, such search shall not commence prior to the 1st day of January, 1870, or the date of the creation of the tenancy whichever the later date.

7. Unless the Examiner considers the lodgment of an allocation schedule or final schedule of incumbrances to be necessary, he should make his report as to the proper allocation of the fund on the Solicitor's Schedule, and the Judicial Commissioner's orders for payment should be made on the same document.

8. When a case is entered before a Judicial Commissioner for payment the Solicitor's Schedule shall be filed in the Registrar's Office, and the office copy of the folio of the Register of Titles, and any deed or other document which the Examiner requires to be retained shall be lodged in the Record Office.

(Signed) J. O. WYLIE.

21st day of December, 1908.

STATUTES.

CAP. XXII.

An Act to amend section one of the Evicted Tenants (Ireland) Act, 1907, with respect to the compulsory acquisition of tenanted land.

[1st August, 1908.]

Be it enacted, &c.

*Amendment of 7 Edw. VII., c. 56, s. 1, as to
Tenanted Land.*

1. The proviso at the end of subsection (3) of section one of the Evicted Tenants (Ireland) Act, 1907, shall not apply in any case where the tenant consents in writing to the compulsory acquisition of the land by the Estates Commissioners: Provided that the tenant shall sign such consent in the presence of two witnesses present at the same time, who shall attach their names thereto, and, when so signed and witnessed, that the said consent shall be filed as a record in the office of the Land Commission.

Construction.

2. This Act shall be construed as one with the Evicted Tenants (Ireland) Act, 1907, and the said

Act of 1907 shall be construed and take effect from the date of its passing as if this Act had then formed part thereof.

Citation.

3. This Act may be cited as the Evicted Tenants (Ireland) Act, 1908, and may be cited with the Evicted Tenants (Ireland) Act, 1907, as the Evicted Tenants (Ireland) Acts, 1907 and 1908.

EX 257.
6/7/09









